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Supreme Court, U.S.
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011247 FEB 25 2002

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No. _________

In The

Supreme Court of the United States

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STATE OF WISCONSIN,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,
Respondents.

◆

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

◆

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the Environmental Protection Agency to treat Indian tribes "as a State" for purposes of regulating certain water resources within their reservations. EPA has construed such authorization as requiring a tribe to prove retained inherent regulatory authority over such waters under principles developed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and subsequent decisions. To establish inherent authority, however, the EPA asks a tribe only to "make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act." 56 Fed. Reg. 64,876, 64,879 (1991). The EPA relied upon, and the Seventh Circuit accepted, that rationale for extending treatment-as-a-State status to the Sokaogon Chippewa Community with respect to Rice Lake, a navigable water body whose bed and banks are owned by the State of Wisconsin by virtue of the equal footing doctrine. The questions presented are:

1. Can an Indian tribe possess inherent authority to regulate navigable waters within its reservation when, under the equal footing doctrine, a State holds and exercises sovereignty over such waters and the submerged lands beneath them?

2. Does EPA's policy that Indian tribes possess inherent authority to regulate navigable waters within a reservation, based on purely hypothetical concerns that state and federal regulation may not adequately curtail water pollution by nonmembers, contravene this Court's precedents concerning the second *Montana* exception, which require that a tribe demonstrate an actual threat to self-governance before it may be deemed to have inherent regulatory authority over nonmembers or resources not held by the tribe?

LIST OF PARTIES

Petitioner, plaintiff-appellant below, is the State of Wisconsin. Respondents are the Environmental Protection Agency and Christie Whitman, defendants-appellees below, and the Sokaogon Chippewa Community ("Tribe"), intervening defendant-appellee below.[1]

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[1] Throughout the course of this case, the Tribe has been referred to variously as the "Band," the "Mole Lake Band," or the "Sokaogon."

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PETITION FOR WRIT OF CERTIORARI

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The State of Wisconsin petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001) and is reproduced in the Appendix commencing at App. 1a. The opinion of the District Court is unreported and is reproduced in the Appendix commencing at App. 15a. The decision of the respondent United States Environmental Protection Agency is not reported and is reproduced commencing at App. 37a.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Water Act of 1972 ("CWA" or "Act"), as amended, 33 US.C. § 1251-1387, and the pertinent regulation EPA has adopted under the Act, are reprinted in the appendix as indicated:

1. 33 U.S.C. §§ 1313, 1370 and 1377 are reproduced at App. 74a, 84a, and 85a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Standards Program, 40 C.F.R. § 131.8 (1997), is reproduced at App. 89a.

INTRODUCTION

This case presents a clash between competing claims of sovereignty over the same navigable waters: a State's assertion of sovereignty arising from the equal footing doctrine and the State's ownership of the waters and their beds, and an Indian tribe's assertion of inherent tribal authority.

The case presents two important questions. The first is whether an Indian tribe may ever demonstrate inherent authority to defeat a State's equal footing sovereignty over navigable waters. Although this Court has never expressly addressed this question, it has repeatedly recognized the States' sovereignty over their navigable waters which they obtained at statehood by operation of the equal footing doctrine. There is no dispute here that the creation of the Tribe's reservation by Secretarial proclamation, nearly a century after statehood, did not impair Wisconsin's sovereignty over the waters at issue. This Court's precedents compel the conclusion that a State's sovereignty over its own navigable waters cannot be defeated by the assertion of inherent authority by a tribe over those same waters. Like EPA, the Seventh Circuit found Wisconsin's sovereignty over the waters at issue irrelevant, but under the principles recognized by this Court, it is dispositive.

The second question is whether, even assuming the first question were answered favorably to the Tribe, a tribe can make the showing required to establish inherent authority based upon a merely hypothetical threat of water pollution from nonmember activities, notwithstanding the existence of comprehensive state and federal pollution control regimes designed to prevent environmental harm. This Court has made clear that the threat from nonmembers must imperil the Tribe's ability to govern itself. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997), *quoting Montana*, 450 U.S. at 564 (unconsented tribal authority over nonmembers does not extend "beyond what is necessary to protect tribal self-government or to control internal relations.'") Otherwise, in the absence of consent by the nonmember, the general rule applies: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565.

EPA has pried wide open the "very narrow" exception to the general rule recognized by the Court. *County of Yakima v. Yakima Indian Nation,* 502 U.S. 251, 267 (1992). The agency has adopted a national policy under which the potential for pollution of any water used by a tribe within its reservation is sufficient to demonstrate tribal authority. This policy ignores the requirement that the tribe must demonstrate the existence of an actual threat to self-government. As a result, EPA's reformulation of the *Montana* second exception, endorsed by the Seventh Circuit, would "severely shrink" the general rule that tribes lack authority over nonmembers. *Strate*, 520 U.S. at 458.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, embodies "a partnership between the States and the Federal Government" in order to fulfill the common purpose of preventing water pollution. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). One of the functions assigned to States is the establishment of water quality standards for their waters, and the certification of compliance with such standards as a prerequisite for the issuance of discharge permits. 33 U.S.C. §§ 1313 & 1341(a); 40 C.F.R. § 122.4(b) & (d). (App. 74a-83a) Wisconsin's comprehensive water pollution regulatory system, including its water quality standards, was one of the first in the nation to receive federal approval under the CWA. *See* 60 Fed. Reg. 25,722-23 (1995).

In 1987 Congress amended the CWA to allow Indian tribes to be treated as states ("TAS")[2] for various purposes under the Act. Pub. L. 100-4, tit. V, § 506, 101 Stat. 76, *codified at* 33 U.S.C. § 1377. That amendment, section 518 of the Act (33 U.S.C. § 1377) (App. 85a-88a) provides in subsection (e), in relevant part:

> The [EPA] Administrator is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section, but only if—
>
> . . . .
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

In December 1991 EPA promulgated a rule implementing section 518(e). 40 C.F.R. § 131.3-131.8 (1996) (App. 89a) (discussed and explained at 56 Fed. Reg. 64,876 *et seq.* (1991) (App. 93a). EPA's rule sets forth the prerequisites to the granting of TAS status for purposes of administering a water quality standards program, including a requirement tracking the jurisdictional provision cited above:

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[2] This petition will use the abbreviation "TAS" to denominate "treatment as a State," or EPA's later refinement of that phrase, "treatment in the same manner as a State." (*See* Final Rule, *Indian Tribes; Eligibility for Program Authorization*, 59 Fed. Reg. 64,339 (Dec. 14, 1994)).

> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation.

40 C.F.R. § 131.8(a)(3) (2001) (App. 89a).

In interpreting the statute and promulgating its rule, EPA rejected the argument that in enacting section 518 Congress had expressly delegated federal power under the Clean Water Act to tribes. Instead, after thoroughly reviewing the legislative history of section 518, EPA determined that "Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." (56 Fed. Reg. 64,880 (1991), App. 105a). This echoed its earlier conclusion that the CWA "authorizes use of *existing* Tribal regulatory authority for managing EPA programs, but it does not grant additional authority to Tribes." 54 Fed. Reg. 39,101 (1989) (emphasis added). This approach was also consistent with Congress' expressed intention in the CWA to minimize any intrusion into states' regulatory power: "Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. (App. 84a)

Accordingly, EPA concluded that "it will . . . continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law." (App.105a) EPA effectuated its interpretation by promulgating a requirement that the Tribe submit "[a] statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes (sic) assertion of authority." 40 C.F.R. § 131.8(b)(3)(ii) (2001). (App. 90a)

Montana set forth the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court recognized two exceptions; the relevant one here being "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. EPA concluded that tribal authority for TAS purposes is to be evaluated in light of this so-called *Montana* "second exception." 56 Fed. Reg. 64,877-78 (1991) (App. 94a-95a).

Having identified the controlling case law, however, EPA professed its uncertainty as to the precise standard applicable to claims of inherent tribal authority over nonmembers. This led EPA to announce that "[i]n response to this uncertainty, the Agency will apply as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. 64,878 (1991) (App. 97a). EPA also announced that the question "[w]hether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings." 56 Fed. Reg. 64,878 (1991) (App. 97a).

Notwithstanding the agency's statements that a tribe must provide specific facts demonstrating serious and substantial threats, EPA proceeded to conclude that to demonstrate the requisite authority a tribe need only "make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members." 56 Fed. Reg. 64,879 (1991) (App. 100a). This lenient test derives from EPA's generalized finding that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule . . . ." 56 Fed. Reg. 64,878 (1991) (App. 97a). Indeed, under EPA's test any tribe with waters within its reservation is virtually assured of obtaining TAS status.[3]

II. PROCEEDINGS BELOW.

A. Administrative Proceedings.

In August 1994, the Tribe applied to EPA for treatment as a state for the purpose of establishing water quality standards for reservation waters, pursuant to section 303 of the CWA (33 U.S.C. § 1313) (App. 74a-83a). Wisconsin, pursuant to 40 C.F.R. § 131.8(c)(3), objected to the Tribe's application on the ground that the equal footing doctrine operated to reserve all navigable waters and the lands under them for the people of Wisconsin, and that the creation of the Tribe's reservation in 1939, 91 years after statehood, did not abrogate the state's sovereignty over the navigable waters on and adjacent to the reservation. (App. 59a-61a, 62a-73a)

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[3] This is confirmed by EPA's admission that "[a]s a general policy, EPA will not deny a tribal application" (EPA Water Quality Standards Handbook: Second Edition at 14). (CR:121, Attachment B) Instead, in the unlikely event that EPA ever receives a tribal application which did not appear to meet this standard, EPA has declared that "[r]ather than formally deny [a] Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur." 56 Fed. Reg. 64,885 (1991) (App. 107a).

In light of Wisconsin's objection to the TAS application, EPA's Regional Counsel referred the matter to the EPA headquarters Office of General Counsel (OGC) for resolution. (App. 115a) The OGC found irrelevant Wisconsin's claim to sovereignty over the waters at issue under the equal footing doctrine: "EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation." (App. 44a). Instead, the OGC relied upon EPA's "generalized findings" of potential adverse impacts to support its conclusion here that "any activities of non-members in the navigable waters . . . could be expected to have a serious and substantial effect on the health and welfare of the Band." (App. 47a). EPA made this finding notwithstanding its acknowledgment that the absence of nonmember-owned lands within the Band's reservation made the likelihood that any on-reservation nonmember activity would impair reservation waters "remote." (App. 45a)

EPA formally approved the Tribe's application in a letter dated September 29, 1995. (App. 37a-47a)

B. Judicial Review of the EPA's Decision.

Wisconsin brought this action in January 1996, pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, seeking review of EPA's decision. Wisconsin subsequently stipulated to intervention by the Tribe. (CR:1, 6)

In April 1999, the district court issued a decision and order granting EPA's and the Tribe's motions for summary judgment. (App. 15a-34a) The district court analyzed neither the state's claim of sovereignty under the equal footing doctrine nor EPA's interpretation and application of Indian law precedent. Instead, it summarily deferred to EPA's decision as "reasonable and permissible." (App. 32a)

Wisconsin appealed, and the Seventh Circuit affirmed. (App. 1a-14a) The decision recognized EPA's conclusion that section 518(e) was not "a plenary delegation of inherent authority to tribes to regulate all reservation waters," 266 F.3d at 744 (App. 3a-4a). Nonetheless, the court turned aside Wisconsin's claim of competing sovereignty under the equal footing doctrine because the statute "explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights." 266 F.3d at 747 (App. 8a). Further, the court observed, the federal government could, pursuant to its commerce clause powers, regulate Wisconsin's navigable waters notwithstanding Wisconsin's ownership of the beds of those waters. Apparently equating tribal power with federal commerce clause power, the Seventh Circuit reasoned that because state sovereignty over those waters did not displace federal authority, it does not preclude tribal authority either.[4] 266 F.3d at 747 (App. 9a-10a).

Addressing the issue of the Tribe's claim of inherent authority under the *Montana* second exception, the court found the test satisfied based on EPA's determination that

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[4] The opinion below asserted that the approval of TAS authority "alarmed" Wisconsin because of its " potential to throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake." 266 F.3d at 745. With due respect, there is nothing in the administrative record that supports this statement. There is a permit application for a proposed mine upstream from Rice Lake (although not on the Wolf River, which is downstream) currently pending before the Wisconsin Department of Natural Resources. However, a private company—not the State—would own and operate the mine; the State, concurrently with EPA, has environmental regulatory authority over such projects.

"'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.'" 266 F.3d at 748, *quoting* 56 Fed. Reg. at 64879. (App. 10a-11a) The court accorded deference to EPA's decision under this Court's decisions in *U.S. v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001), and *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 843 (1984). 266 F.3d at 746 (App. 6a-7a).

Wisconsin sought rehearing and suggested rehearing *en banc*, which the Seventh Circuit denied by order dated November 28, 2001. (App.48a-49a)

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS OF COMPETING SOVEREIGNTY PRESENTED HERE ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

This Court has long recognized the sovereign nature of the States' interest in their navigable waters, acquired at statehood. "The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283–284 (1997). "State ownership of [submerged lands] has been 'considered an essential attribute of sovereignty.'" *Ibid.* at 283, quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). As Justice Holmes observed, few matters "are more obvious, indisputable, and independent of particular theory" than the sovereign authority of a State to regulate the uses and development of navigable waters within its borders, subject to the constraints in the federal Constitution and to appropriate congressional regulation under the Commerce

Clause. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). If the decision below is allowed to stand, Wisconsin will lose much of that authority with respect to hundreds of navigable water bodies.

This Court previously has been called upon to resolve competing claims of title by states and tribes to the beds of navigable lakes within an Indian reservation, *Idaho v. United States*, 533 U.S. 262 (2001); *United States v. Holt State Bank*, 270 U.S. 49, 59 (1926); and competing claims of title to the bed of a river within a reservation, *Montana*, 450 U.S. at 556. Although, as Wisconsin shows below, it is implicit in *Montana* that tribal inherent authority cannot displace state sovereignty over navigable waters, the Court has never directly confronted the claim accepted by the court below—namely that tribal inherent authority *can* override state sovereignty with respect to the state's waters. This case starkly presents the collision of these competing claims of sovereignty.

Wisconsin exemplifies the potential impact of the ruling below. Each of Wisconsin's eleven Indian tribes has a reservation. Some consist of large contiguous parcels, while others consist of small, widely scattered land holdings. All eleven tribes, however, hold lands adjacent to or surrounding navigable waters. By EPA's estimate, on Wisconsin's Indian reservations there are many hundreds of navigable lakes.[5] Under the decision below, any Wisconsin tribe which applies for TAS authority to regulate those waters is assured of receiving EPA approval under its lenient test. Because there are Indian lands on several major rivers within Wisconsin, a grant of TAS status to the Tribe could require upstream wastewater dischargers—including many municipalities and industrial dischargers—to meet tribal water quality standards, pursuant to 33 U.S.C. § 1341.

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[5] *See* http://www.epa.gov/reg5oopa/tribes/wisconsintribes.htm. The Menominee Reservation alone contains 200 lakes. *See* http://www.epa.gov/reg5oopa/tribes/tribepages/menominee.htm. Lakes and rivers account for more than 20 percent of the Lac du Flambeau Reservation's surface area and 40 percent of the reservation's population are nonmembers of the tribe. *See* http://www.epa.gov/reg5oopa/tribes/tribepages/lacduflambeau.htm.

Exacerbating the mischief caused by EPA's policy is the deference the Seventh Circuit accorded to EPA's interpretation of Indian law precedent. 266 F.3d at 746. As one appellate court has put it, "[i]t is nonsense to suggest that a federal court must defer to an administrative agency in determining the meaning and applicability of the court's own precedent." *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992). When faced with this precise issue, the Ninth Circuit declined to defer to EPA's legal analysis of Indian law precedent. *See State of Mont. v. U.S. E.P.A.*, 137 F.3d 1135, 1140 (9th Cir.), *cert den.*, 525 U.S. 921 (1998) ("EPA's delineation of the scope of tribal inherent authority is not entitled to deference"). In deferring to EPA's interpretation and application of Indian law precedent, matters well beyond its institutional expertise, the court below misapplied *Chevron*.

The issues presented here are not unique to Wisconsin, but are of national significance. In EPA's initial response to Wisconsin's competing claim of jurisdiction it wrote: "EPA considers some issues raised by WDNR [Wisconsin Department of Natural Resources] (i.e., ownership of water beds within the reservation and the effect of that ownership on the right to regulate water quality) to be nationally significant." (App. 115a) EPA reports that over 210 tribes nationwide have received TAS status under various provisions of the Clean Water and Safe Drinking Water Acts, 42 U.S.C. § 300j-11; as of March 1998, 14 tribes had obtained EPA's TAS approvals under section 303 of the CWA for their water quality standards program.[6] EPA has announced its intentions to increase that number by five-fold by 2005.[7] Given that the legal issues presented here arise from the national policies EPA is actively promoting, these problems likely will recur until resolved by this Court. *See State of Mont.*, 137 F.3d at 1141 (deferring to EPA's application of the *Montana* second exception and upholding grant of TAS to tribe).

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[6] *See* http://www.epa.gov/indian/matrix.htm;

http://www.epa.gov/ow/strategy/, pages 9 and 11

This dispute is far more than an academic exercise. The Court has cautioned against "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990). This caution is based on an "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty,'" *Nevada v. Hicks*, 121 S. Ct. 2304, 2323 (2001), *quoting Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). The Court has also recognized that the "ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals.'" *Hicks*, 121 S. Ct. at 2323, quoting *Duro*, 495 U.S. at 693 (Souter, concurring). Unless EPA's policy is corrected, large numbers of nonmembers in this country may find, to their considerable surprise, that they have become subject, either directly or indirectly, to the authority of tribal governments in which they have no rights to participate and which may provide limited opportunity for fair review of adverse tribal decisions. This is particularly true on reservations, like some in Wisconsin, populated by large numbers of nonmembers.[8]

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[7] *See ibid.*, page 11. *See also ibid.*, at 18 (EPA Indian Program "key" objectives include "[i]ncreas[ing] significantly the number of Tribes implementing environmental programs.")

This case is a good vehicle for addressing the limits of tribal sovereignty over nontribal resources and persons. It squarely presents the clash between a state's sovereignty over its own public waters, under the equal footing doctrine, and tribal assertions of inherent authority to regulate those same waters. It also provides a good context for clarifying the scope of tribal inherent authority under the so-called "second exception" of *Montana*. The relevant facts are straightforward and undisputed, providing a clear avenue to address both of the fundamentally important issues this case presents.

II. EPA'S POLICY, ENDORSED BY THE SEVENTH CIRCUIT, CONFLICTS WITH THIS COURT'S PRECEDENTS BY ALLOWING TRIBAL CLAIMS OF INHERENT AUTHORITY TO OVERRIDE STATE SOVEREIGNTY OVER NAVIGABLE WATERS UNDER THE EQUAL FOOTING DOCTRINE.

By allowing the Tribe to exercise regulatory authority over Wisconsin's waters, the Seventh Circuit's decision has undercut this Court's precedents recognizing the State's sovereignty over its waters. Both the court below and EPA

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[8] For example, nonmembers of the Oneida Nation own approximately 80 percent of the 65,000-acre Oneida reservation, which is located partially within the City of Green Bay, and comprise approximately 85 percent of the reservation population.

See http://www.epa.gov/reg5oopa/tribes/tribepages/oneida.htm and http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=25000US2560.html assumed Wisconsin had obtained title to the waters and their beds under the equal footing doctrine, but found this entirely compatible with the Tribe's assertion of inherent authority over those same waters. 266 F.3d at 746, citing, *inter alia*, *Idaho*, 521 U.S. at 283-88. (App. 7a-8a) The Seventh Circuit thus found "reasonable" EPA's conclusion that "ownership of the waterbeds did not preclude federally approved regulation of the quality of the water" by the Tribe. *Wisconsin*, 266 F.3d at 747. (App. 10a)

This miserly view of States' interests under the equal footing doctrine cannot be reconciled with this Court's precedents. This Court long ago rejected the notion that a State and an Indian tribe can possess "dual sovereignty" over natural resources within a State: "[s]uch a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." *Kennedy v. Becker*, 241 U.S. 556, 563 (1916). *Kennedy* relied on the obvious distinction, equally relevant here, between tribal rights to use natural resources and tribal sovereignty to regulate them. *See also Puyallup Tribe v. Department of Game, Wash.*, 391 U.S. 392, 399 (1968) (tribal fishing rights subject to "overriding police power of the State" to conserve fish and game resources); *United States v. Winans*, 198 U.S. 371, 384 (1905); *United States v. State of Washington*, 520 F.2d 676, 686, n. 4 (9th Cir. 1975).

Wisconsin recognizes and respects the Tribe's use rights in Wisconsin's natural resources, and its ability to protect those rights, but those rights do not give rise to tribal power to regulate the resources. *See Lac Courte Oreilles Band of Indians v. State*, 707 F. Supp. 1034, 1053 (W.D. Wis. 1989) (crediting Wisconsin with accommodating tribal use rights). In fact, this Tribe litigated and lost on the dual sovereignty issue in previous litigation with the State of Wisconsin concerning the prerogative to manage fisheries. *Ibid.* at 1060 ("The fact that [the tribes] may be regulating their members' exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the [State's].)"

With respect to the waters at issue here, as between the State and the Tribe sovereignty resides exclusively with the State. When Wisconsin attained statehood in 1848 it obtained title to the waters at issue and their beds, through operation of the equal footing doctrine.[9] *Coeur d'Alene*, 521 U.S. at 283. Along with that title flowed the sovereign right to control their use.

In *Idaho*, 521 U.S. 261, for example, a tribe sued a state to establish tribal ownership of navigable waters lying within the Tribe's reservation. The Court emphasized that far more was at stake than mere title to submerged lands. There the

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[9] The state's enabling act, Act of August 6, 1846, 9 Stat. 56, authorized admission "into the Union on an equal footing with the original States in all respects whatsoever," and, consistent with the Northwest Ordinance of 1787, provided that all waters within the new state would be "forever free, as well to the inhabitants of the said State as to the citizens of the United States." *Ibid.* § 3, 9 Stat. 57. The "forever free" guarantee was then carried over into Art. IX, § 1 of the Wisconsin Constitution. As a state that was part of the Northwest Territory, Wisconsin's ownership and sovereignty over its navigable waters and the beds of those waters are governed by the public trust doctrine. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-53 (1892).

Court noted that if the Tribe could establish ownership of the waters,

> substantially all benefits of ownership and control would shift from the State to the Tribe. . . .
>
> . . . .
>
> Not only would the relief block all attempts by these [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect. As we stressed in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-98, 107 S. Ct. 2318, 2320-2322, 96 L.Ed.2d 162 (1987), lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." . . .
>
> The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. The principle arises from ancient doctrines.

521 U.S. at 282-84. That the beds of navigable waters "are tied in a unique way to sovereignty," *Ibid.*, 521 U.S. at 286, is reinforced in other decisions of this Court. *See United States v. State of Oregon*, 295 U.S. 1, 14 (1935); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *Withers v. Buckley, et al.*, 61 U.S. (20 How.) 84, 92-93 (1858); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1844).

In *Montana* itself this Court emphasized the sovereignty accompanying state ownership of the beds of navigable waters. In fact, the United States brought that action seeking a declaration that the Tribe—not the state—owned the bed of the Big Horn River, under the theory that this would establish a sufficient basis for tribal regulatory authority over nonmember hunting and fishing. 450 U.S. at 549. In Part II of its decision, this Court noted that all of the parties and the courts below "assumed that ownership of the riverbed will largely determine the power to control [nonmember hunting and fishing in and on the river]." 450 U.S. at 550 n.1. Far from expressing any disagreement with that proposition, this Court elaborated that "the ownership of land under navigable waters is an incident of sovereignty." 450 U.S. at 551.

Having disposed of the tribal claim of regulatory authority over the *waters* of the Big Horn River, by virtue of its equal footing analysis, the Court then turned, in part III of its decision, to the tribe's assertion of regulatory authority over nonmembers on reservation *lands*. The issue here was "the power of the Tribe to regulate non-Indian fishing and hunting *on reservation land owned in fee by nonmembers* of the Tribe." *Id.* (emphasis added). It was only in this context—regulation of nonmember activities on fee lands, as opposed to activities in the waters themselves—that the Court announced its "general rule" against tribal authority. 450 U.S. at 566. Thus, ownership of the beds of navigable waters is not irrelevant, as the Seventh Circuit concluded, but is *dispositive* of the issue of tribal authority over those waters.

That Wisconsin has held the waters at issue here since statehood is not disputed. The Tribe has never had the right to "occupy and exclude" nonmembers from Rice Lake or any other public waters in the State of Wisconsin. The Tribe's reservation was not created until 91 years after Wisconsin was admitted into the Union—in 1939—when the United

States placed into trust 1,438 acres of land that it had purchased adjacent to those waters.[10] (App. 109a) No party to this suit has contended that in 1939 the United States, by administratively proclaiming a reservation consisting of the dry lands adjacent to navigable waters, purported to impair Wisconsin's longstanding ownership of and sovereignty over those waters.[11] As this Court has observed in this context, "of course" the government was aware of the presumption against federal conveyance of navigable waters to the detriment of state sovereignty "once it was established by this Court." *Montana*, 450 U.S. at 552 n.2, *citing inter alia*, the *United States v. Holt State Bank*, 270 U.S. 49 (1926), which was decided thirteen years before the Band's reservation was created. It was similarly then understood that "[I]f navigable waters have not been reserved the tribe has but a right of use in common with citizens of the state." Felix S. Cohen, *Handbook of Federal Indian Law*, 318 (1941).

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[10] By 1842, six years before Wisconsin became a state, the Chippewa, including the Band, had ceded to the United States all their Wisconsin lands, retaining only use and occupancy rights. *See Sokaogon Chippewa Community v. Exxon Corp.*, 805 F. Supp. 680, 686 (E.D. Wis. 1992), *aff'd* 2 F.3d 219 (7th Cir. 1993). Thus in 1848 the Tribe had no territory over which it exercised sovereignty; the site of its future reservation, including the waters at issue here, passed to Wisconsin and became subject to its sovereign power. The reservation was created by proclamation of the Assistant Secretary of the Interior pursuant to § 7 of the Indian Reorganization Act of 1934, 48 Stat. 986, 25 U.S.C. § 467. 4 Fed. Reg. 1429 (1939) (App. 108a-109a).

[11] To be sure, there are circumstances in which the presumption of state title to and sovereignty over navigable water may be overcome and where equal footing considerations therefore would not pose an obstacle to tribal TAS authority. *See, e.g., Idaho v. United States*, 533 U.S. 262 (2001); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Muckleshoot Indian Tribe v. Trans-Canada*, 713 F.2d 455, 457 (9th Cir. 1983); and *Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982).

The decision below suggests that Wisconsin's sovereignty under the equal footing doctrine has been somehow overridden by Congress' enactment of section 518(e). According to the Seventh Circuit, Wisconsin's equal footing claim is irrelevant because "[t]he Clean Water Act . . . explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights." 266 F.3d at 747 (App. 8a). This is contrary to EPA's conclusion that section 518(e) did not delegate federal authority to tribes, but merely recognized existing tribal authority. As *Montana* teaches, when a state owns water beds and possesses sovereignty over them under the equal footing doctrine, that is the end of the inquiry with respect to regulatory authority over those waters.

This Court has found the second exception applicable in a variety of contexts. Examples include situations where reservation lands are owned in fee by nonmembers, (*Montana; Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); and *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 414 (1989)); where reservation lands have been taken by the federal government for public use (*South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)); and where reservation lands have been subjected to a "right-of-way open to the public" (*Strate).* However, this Court has never applied the *Montana* second exception to find tribal authority over navigable waters held by a state. When called upon to examine such a claim, this Court in *Montana* applied an equal footing analysis, not the second exception test for tribal sovereignty over alienated lands.

Wisconsin fully recognizes that the United States has regulatory authority over navigable waters under the commerce clause. *Montana*, 450 U.S. at 551; *Solid Waste Agency v. Army Corps. of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 677-78, 680-81 n.3 (2001). Contrary to the decision below, however, it simply does not follow that because the federal government has regulatory authority Wisconsin "cannot now complain about the federal government allowing tribes to do so." *Wisconsin*, 266 F.3d at 747.

The existence of federal regulatory authority is irrelevant given EPA's determination that in enacting the TAS provision Congress did not intend to delegate any federal power to tribes, but only to recognize pre-existing tribal authority. *Wisconsin*, 266 F.3d at 748. Regardless whether the federal government can regulate the waters at issue here, under EPA's rules the Tribe must demonstrate an independent source of pre-existing tribal regulatory authority. Similarly, given Congress' intent not to alter the existing balance between tribal and state regulatory powers over waters, whether the Indian commerce clause might authorize Congress to enlarge tribal power at the expense of state sovereignty is not at issue here. 266 F.3d at 747.

In sum, Wisconsin's sovereignty over its navigable waters and their beds is incompatible with tribal inherent authority over those same waters. This Court has never held that tribal inherent authority can somehow override state sovereignty under the equal footing doctrine. Even if it could, the prerequisites for a finding of inherent authority under the *Montana* second exception are absent here, as shown next.

III. EPA'S POLICY VASTLY BROADENS THE *MONTANA* SECOND EXCEPTION, EFFECTIVELY ELIMINATING THIS COURT'S REQUIREMENT THAT TRIBES DEMONSTRATE A THREAT TO TRIBAL SELF-GOVERNANCE.

This Court has made abundantly clear the general rule that tribes lack authority over nonmembers. *Montana*, 450 U.S. at 564; *Atkinson Trading Co.,* 532 U.S. 645; and *Hicks*, 121 S.

Ct. at 2309-2310. Equally clear is that the exception at issue here is exceedingly narrow. The scope of tribal authority under the *Montana* second exception does not extend "beyond what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 520 U.S. at 459, *quoting Montana*, 450 U.S. at 564.

Applying this test, this Court has rejected attempts by tribes to adjudicate litigation involving on-reservation traffic accidents (*Strate*), to tax transactions between nonmembers on nontribal reservation lands (*Atkinson*), to adjudicate claims of misconduct by state officers on tribal land (*Hicks*), to regulate hunting and fishing by nonmembers within reservations (*Montana* and *Bourland*), and with "one minor exception,"[12] *Hicks*, 121 S. Ct. at 2310, to exercise zoning authority over nonmembers on fee lands (*Brendale*).

Further, as the Court recently observed, "[b]oth *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude' . . . the *absence* of tribal ownership has been virtually conclusive of the *absence* of tribal civil jurisdiction," *Hicks*, 121 S. Ct. at 2310 (emphasis added, citations omitted). The Seventh Circuit's decision finding the state's ownership of the waters irrelevant violates this principle.

Despite the repeated pronouncements of this Court, EPA adopted and persists in applying as its national policy an interpretation of *Montana* which guarantees a finding of tribal regulatory jurisdiction in every instance and without proof that such jurisdiction is necessary for tribal self-government. The court below implicitly endorsed EPA's assertion that "'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.'" *Wisconsin*, 266 F.3d at 748, quoting 56 Fed. Reg. at 64,879 (App. 10a-11a).

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[12] The "minor exception" was the holding in *Brendale* that the tribe could zone the nontribally owned property comprising approximately 3 percent of an 807,000-acre area within a reservation that was "closed to public entry." *Hicks*, 121 S. Ct. at 2310, citing *Brendale*, 492 U.S. at 443, 444, 458-459 (opinions of STEVENS, J., and BLACKMUN, J.)

The decision below conflicts with this Court's precedents in major respects. First, *Strate* made clear that protecting health and safety alone is not essential to self-governance. The Court observed there that even though careless driving within a reservation "surely jeopardize[s] the safety of tribal members . . . if *Montana's* second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 458. The same principle applies with equal force here. Nothing in the administrative record suggests that the tribe's self-governance is in jeopardy unless it is allowed to exercise regulatory authority under the CWA over the waters adjacent to or within its reservation.[13]

Second, the disputed activity must pose a real—not abstract or hypothetical—threat to a tribe. In *Montana*, for example, the Supreme Court looked at the protective effect of existing state regulations and observed that the tribe had not alleged "that the State has abdicated or abused its responsibility for protecting and managing wildlife . . . or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State." 450 U.S. at 566 n.16. *See also Brendale*, 492 U.S. at 430-31 (Plurality Op. of J. White) (potential harm should be measured in light of regulatory action by non-tribal governments). Similarly, in *Strate* the Court considered the effect of allowing litigation to proceed "in the state forum open to all who sustain injuries on North Dakota's highway." 520 U.S. at 459. *See also Hicks*, 121 S. Ct. at 2316 ("That the actions of these state officers cannot threaten or affect those interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject.")

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[13] Wisconsin does not quarrel with the importance of protecting water quality, but there simply are no facts in the record to support a finding that *tribal* regulation of water quality—as opposed to federal or state regulation—is necessary for tribal self-governance. The Seventh Circuit's statement that Wisconsin conceded tribal regulation was necessary to protect the political integrity, the economic security, or the health and welfare of the tribe, *Wisconsin*, 266 F.3d at 747 (App. 8a), is erroneous; Wisconsin argued exactly the opposite. *See* Brief of Plaintiff-Appellant at 41-45.

Clearly, the impacts upon tribal welfare under *Montana's* second exception are not to be considered in some sort of hypothetical regulatory vacuum. EPA has formally approved Wisconsin's water quality standards as adequate to protect public health and welfare and to enhance the environment. *See* 55 Fed. Reg. 31,892. Further, as the Seventh Circuit acknowledged, an additional regulatory safeguard exists in that EPA "has the ultimate authority to decide whether or not to issue a permit." *Wisconsin*, 266 F.3d at 750 (App. 13a). Not only does the Tribe have ample rights to challenge any permits issued by the state—through administrative as well as judicial means—but its interests are effectively protected in any event by EPA, which has veto power over state-issued permits.

The Seventh Circuit's conclusion that the Tribe's self-governance is threatened by continued state and federal–as opposed to tribal–environmental oversight is inconsistent with this Court's precedents. It clearly erred in upholding EPA's reformulation of the *Montana* second exception. 266 F.3d at 750 (App.13a). Allowing this dramatic expansion of the narrowly drawn second exception to stand would result in the widespread and unlawful assertion of tribal regulatory jurisdiction over the sovereign waters of Wisconsin and other states, and over their nonmember citizens.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2002

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In the
United States Court of Appeals
for the Seventh Circuit

No. 99-2618

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY
and CHRISTIE WHITMAN,[*]

Defendants-Appellees,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 96-C-90–**Charles N. Clevert**, *Judge*

ARGUED NOVEMBER 6, 2000–
DECIDED SEPTEMBER 21, 2001

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[*] Pursuant to Fed. R. App. P. 43(c), Christie Whitman is substituted as a party for Carol M. Browner.

Before KANNE, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Although the general model of sovereignty suggests that different sovereign states normally occupy different geographic territories, see, *e.g.*, Restatement (3d) of the Foreign Relations Law of the United States, § 201 (1986), the existence of federations and confederations shows that overlapping sovereignty is also a common feature of modern political organization. In this case, we confront one of the more complex kinds of overlapping sovereignty that exists in the United States today: that between the States and Indian tribes. The Supreme Court addressed one aspect of that relationship in its 2000 Term in *Nevada v. Hicks*, 121 S. Ct. 2304 (2001), which held that tribal authorities lacked legislative jurisdiction to regulate the activities of state officials on reservation land when those officials were investigating off-reservation violations of state law. *Id.* at 2318. A different aspect of the same relationship is before us here: namely, whether the Environmental Protection Agency (EPA), acting through authority delegated to it by statute, was empowered to treat a particular tribe as a "state" for purposes of certain water quality rules. Like the district court, we conclude that the EPA acted properly in doing so, and we thus affirm the district court's judgment rejecting the challenge Wisconsin has brought to the EPA's action.

I

A. The Clean Water Act

The Clean Water Act (the Act) prohibits the discharge of pollutants into navigable waters unless the discharge is sanctioned by a permit or statute. See 33 U.S.C. § 1311(a). Permits are issued by the EPA or by state agencies subject to EPA review. *Id.* at § 1342. The Act also gives states the authority to establish water quality standards for waters within their boundaries (*id.* at § 1313), to certify compliance with those standards (*id.* at § 1341), and to issue and enforce discharge permits (*id.* at §§ 1342, 1319), all under the watchful eye of the EPA. Like other states, Wisconsin has enacted its own federally approved comprehensive water pollution regulatory system. See Wis. Adm. Code chapters 33, 280, 281, NR 100-91, and NR 102-106.

In 1987, Congress amended the Act to authorize the EPA to treat Indian tribes as states under § 518 of the Act. Once a tribe has treatment-as-state (TAS) status, the statute permits it to establish water quality standards for bodies of water within its reservation and to require permits for any action that may create a discharge into those waters. 33 U.S.C. § 1377(e). In 1991, after full notice-and-comment rule-making, the EPA issued a final rule implementing this provision and setting forth the requirements Indian tribes would have to meet in order to be granted TAS status:

> (1) the tribe must be federally recognized;
>
> (2) the tribe must have a governing body carrying out substantial governmental duties and powers;
>
> (3) the functions to be exercised by the tribe must pertain to the management and protection of water resources which are held by the tribe, held by the United States in trust for the tribe, or otherwise within the borders of the reservation; and
>
> (4) the tribe must be capable of carrying out the functions of the Act.

40 C.F.R. 131.8(a); see also 33 U.S.C. §§ 1377(e)(1)-(3).

Relying heavily on the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), the EPA concluded that this was neither a plenary delegation of inherent authority to tribes to regulate all reservation waters, nor was it a standard that precluded tribal regulation of any non-member or any off-reservation activity. See 56 Fed. Reg. at 64877. Instead, the agency chose a case-by-case approach under which a tribe attempting to satisfy element (3) of the regulation would have to show that it possesses inherent authority over the waters in light of evolving case law. See 56 Fed. Reg. at 64878. There was no question that tribes could regulate the activities of tribal members, undertaken on the reservation, in order to protect the quality of reservation waters. In addition, the EPA concluded that "a tribe may regulate the activities of non-Indians on fee lands within its reservations when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

The EPA acknowledged that this will usually be an easy showing, based on "generalized findings" that water quality is related to human health and welfare. See *id.* Although the EPA stated that it would make a case-specific determination with regard to the scope of each tribe's authority, once a tribe has shown that impairment of the waters on the reservation would have a serious and substantial effect on the health and welfare of the tribe, the EPA presumes that there has been an adequate showing of inherent authority. *Id.* at 64879.

B. The Mole Lake Band and its Application For TAS Status

The waters at issue in this case are lakes and streams adjacent to or surrounded by the reservation of the Sokaogon Chippewa Community, also known as the Mole Lake Band of Lake Superior Chippewa Indians (the Band), located in northeastern Wisconsin. The Mole Lake reservation is unusual in two respects. First, the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. In particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band. Second, all of the 1,850 acres within the reservation are held in trust by the United States for the tribe. None of the land within the reservation is controlled or owned in fee by nonmembers of the tribe.

In August 1994, the Band applied for TAS status under the Act. Wisconsin opposed the application, arguing that it was sovereign over all of the navigable waters in the state, including those on the reservation, and that its sovereignty precluded any tribal regulation. Nevertheless, after elaborate administrative proceedings, on September 29, 1995, the EPA approved the Band's application, finding that the tribe had satisfied all of the requirements of 40 C.F.R. § 131.8, including the necessary demonstration of its inherent authority over all water resources on the reservation. In keeping with its earlier positions, the EPA noted that the inherent authority question did not turn on who had title to the land underneath the waters.

This grant of TAS status alarmed the State of Wisconsin, which saw it as both an affront to the state's sovereignty and, more pragmatically, as an action with the potential to throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake. Concerned about its loss of authority over certain territory within its outer boundaries and worried that the tribal water standards might limit the activities of the mine by prohibiting some or all of the discharge from the mine, Wisconsin filed this action in district court on January 25, 1996, reiterating its challenge to the EPA's grant of TAS status to the Band. (The United States and the EPA waived immunity under 5 U.S.C. § 702.) The state's case raises a fundamental challenge to the TAS grant; the relief it seeks is outright revocation of the grant, rather than mere accommodation for any particular project.

We are therefore satisfied that the issue is ripe now and need not await the Band's promulgation of specific water quality standards. If Wisconsin is right, it is entitled to have the EPA's creation of a state-like entity within its borders voided–an action that lies within the power of the court. See *Community Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981 (7th Cir. 2000). Similarly, it is one in which a failure to review the issue now would cause hardship to the parties. *Id.*

In April 1999, the district court upheld the TAS grant, finding that the EPA's determination that a tribe could regulate all water within the reservation, regardless of ownership, was a reasonable interpretation of the relevant statutes and regulations. Wisconsin now appeals.

II

We review a grant of summary judgment *de novo*, *Doe v. Howe Military Sch.*, 227 F.3d 981, 990 (7th Cir. 2000), applying the same standards as the district court: we will set aside an agency determination only if it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." See *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001); see also the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (set aside agency decision if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law). We should uphold the agency's determination as long as it considered relevant data under the correct legal standards and offered a satisfactory explanation for its actions. See *Howard Young Med. Ctr., Inc. v. Shalala*, 207 F.3d 437, 441 (7th Cir. 2000). Moreover, the EPA here has interpreted the statute by promulgating formal regulations, using plenary notice-and-comment procedures, and then implementing its rule with respect to the Band through a formal process in which the state was entitled to be heard. Its regulations and subsequent decision are therefore entitled to deference under *Mead*, 121

S. Ct. at 2171, and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1994).

Wisconsin is challenging the EPA's findings only with respect to the third requirement for TAS status–the demonstration of the tribe's inherent authority to regulate water quality within the borders of the reservation. Wisconsin gives three reasons why the EPA's determination that the tribe had established such authority was unreasonable.

1. Not "Within the Borders"

For the first time on appeal, Wisconsin contends that Rice Lake is not "within the borders" of the reservation because the legal description of the reservation runs only to the Lake's highwater mark. This argument is waived, however, because Wisconsin did not present it to the EPA. See *Vermont Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54 (1978). Furthermore, even if we could overlook this waiver and considered the argument on its merits, we would reject it. As the map attached to the Stipulated Joint Appendix illustrates, Rice Lake is almost completely surrounded by reservation land (and the small percentage that is not abuts off-reservation trust lands). If the EPA had been given a chance to consider this point, it would have been completely reasonable for it to interpret the phrase "within the borders" to include such a body of water.

2. No Authority Because No Title

Second, Wisconsin argues that the tribe does not have authority over the water resources on the reservation because the state has ownership of the underlying lake beds. We will assume for the purposes of this appeal that, pursuant to the Equal Footing Doctrine, the state does indeed have title to the lake beds within the reservation. See *Idaho v. Coeur d'Alene*

Tribe of Idaho, 521 U.S. 261, 283-88 (1997); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-96 (1987).

This court has indeed held that, in some situations, state ownership of lake beds may restrict a tribe's authority to regulate the waters running over those beds. In *Wisconsin v. Baker*, 698 F.2d 1323, 1335 (7th Cir. 1983), we found that, because the state of Wisconsin held title to the underlying lake beds in a reservation, the Chippewa Band was precluded from restricting hunting and fishing in the reservation waters.

But contrary to Wisconsin's assertions, *Baker* does not dispose of this case. Most importantly, *Baker* did not involve a particular statute under which Congress specified that tribes would be entitled to be treated as states under particular circumstances, and both Congress and the responsible agency outlined the regulatory authority tribes were to exercise. The legal structure governing *Baker* involved only the treaty that created the reservation, and that treaty did not contain any language regarding the tribe's power to regulate reservation waters. The Clean Water Act, by contrast, explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights. Secondly, the *Baker* court explicitly states that the "defendants do not contend that public fishing and hunting pose an imminent threat to the 'political integrity, the economic security, or the health or welfare' of the Band." *Id.* at 1335. Thus, the *Baker* court left open the possibility that state ownership of lake beds may not preclude tribal authority over the waters if tribal regulation was necessary to protect the "political integrity, the economic security, or the health or welfare" of the Band, as both parties concede is the case here. Thirdly, *Baker* was about hunting and fishing rights, which have traditionally been the subject of state regulation, while the ultimate authority for the water quality standards lies with the federal EPA, not the state of Wisconsin (which itself has acted only pursuant to federal delegation).

Baker therefore has little or no application to the case before us. We find pertinent instead a number of legal principles all of which support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation. First, "the power of Congress to regulate commerce among the states involves the control of the navigable waters of the United States." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). This power has not been eroded in any way by the Equal Footing Doctrine cases, which "involved only the shores of and lands beneath navigable waters. [The doctrine] cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause." *Arizona v. California*, 373 U.S. 546, 597-98 (1963). Unlike the situation in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), here no one disputes that the waters at issue are "navigable waters" for purposes of either the Clean Water Act or the Commerce Clause.

The breadth of federal authority over Indian affairs is equally well-established: "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters."); U.S. Const., Art. I, § 8, cl.3. In fact, in the absence of tribal TAS status, the EPA and not the state of Wisconsin might well be the proper authority to administer Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

Because the state does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so. It was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water, and we uphold that determination.

3. No Inherent Authority over Off-Reservation Activities

Finally, Wisconsin argues that the Band did not make the required showing of authority over those activities potentially affected by its imposition of water quality standards. Because the EPA has determined that, unlike the Clean Air Act, the Clean Water Act is not an express delegation of power to tribes, see 56 Fed. Reg. at 64880, the EPA requires tribes to show that they already possessed inherent authority over the activities undoubtedly affected by the water regulations. EPA regulations allow a tribe to establish this authority by showing that impairment of the reservation's waters would affect "the political integrity, the economic security, or the health or welfare of the tribe." 56 Fed. Reg. at 64877.

This regulatory language tracks the Supreme Court's decision in *Montana v. United States, supra*, in which the Court recognized the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S. at 565, but went on to hold that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. See also *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1825 (2001). The regulations also track the more recent Supreme Court language in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), by noting that authority is usually proper because "water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 Fed. Reg. at 64879. (We note too that this case does not involve any question of the tribe's ability to restrict activities of state law enforcement authorities on the reservation, when those officials are investigating off-reservation crimes, and thus the rule of *Hicks*, 121 S. Ct. 2304, is not implicated.)

Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (*e.g.*, zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters (assuming for the sake of argument that the reservation standards are more stringent than those the state is imposing on the upstream entity). See *Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Such compliance may impose higher compliance costs on the upstream company, or in the extreme case it might have the effect of prohibiting the discharge or the activities altogether. This is a classic extraterritorial effect, which Wisconsin argues is impermissible and takes this case beyond the scope of *Montana*, which concerned only tribal authority over non-member activities on reservation fee lands.

But this is not the only situation where upstream and downstream users may have different standards and some accommodation is necessary. Wisconsin's argument could be made equally if the downstream regulator were Illinois, yet in that case the need for the two states to coordinate their standards, or for the upstream company to comply with the more stringent rules, would be clear. In fact, Congress anticipated this very problem in the statute, and it had the following to say about it:

> The Administrator shall, in promulgating such regulations [for TAS status], consult affected States

> sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

33 U.S.C. § 1377(e).

The EPA has developed the mechanism called for by the statute, which allows it to mediate conflicting interests when a tribe's standards differ from those of a state. See also 33 U.S.C. § 1341(a). In addition, once a tribe is given TAS status, the Act gives it the same right as that given to states to object to permits issued for upstream off-reservation activities. See 56 Fed. Reg. at 64887. In deciding whether to issue a permit for discharge within a state that may violate the water quality standards of a downstream tribe, the EPA may ask the parties to engage in mediation or arbitration, in which the decision-maker and the EPA administrator, who has the final authority over the issuance of the permit, will consider such factors as "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." 33 U.S.C. § 1377(e). The EPA may then ask the tribe to issue a temporary variance from its standards for the particular discharge or may ask the state to provide additional water pollution controls. See 54 Fed. Reg. at 39099-101; 56 Fed. Reg. at 64885-89; 40 C.F.R. §§ 121.11 through 121.16. This mechanism, rather than a futile effort to avoid extraterritorial effects, is the way both Congress and the agency sought to accommodate the inevitable differences that would arise.

We say "inevitable" because activities located outside the regulating entity (here the reservation), and the resulting discharges to which those activities can lead, can and often will have "serious and substantial" effects on the health and welfare of the downstream state or reservation. There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation, and it would be exceedingly hard to say that the EPA's interpretation is contrary to law in the face of the express recognition of this issue and the choice of a solution in the statute itself. It was reasonable for the EPA to determine that, since the Supreme Court has held that a tribe has inherent authority over activities having a serious effect on the health of the tribe, this authority is not defeated even if it exerts some regulatory force on off-reservation activities.

Finally, we think Wisconsin exaggerates the power of the tribe to veto upstream discharge activities. The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute or the EPA's power. To the contrary, the EPA supervises all standards and permits. Far from allowing a tribe to veto a state permit, granting TAS status to tribes simply allows the tribes some say regarding those standards and permits. It is quite possible that, in particular cases, perhaps through the vehicle of the statutory mediation mechanism, the EPA may require the tribe's more stringent standards to give way to upstream discharge and development. Whether the tribe or the state ultimately "wins" in the dispute, it is the EPA, not the tribe or the state, that has the ultimate authority to decide whether or not to issue a permit.

Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities. Since a state has the power to require upstream states to comply with its water quality standards, to interpret the statutes to deny that power to tribes because of some kind of formal view of authority or sovereignty would treat tribes as second-class citizens. Nothing in § 1377(e) indicates that Congress authorized any such hierarchy. Particularly in light of the deference we owe to the EPA's decisions here, we see nothing that would justify our setting aside the agency's action.

III

We conclude that the EPA's grant of TAS status to the Band is not arbitrary, unreasonable, or contrary to law and we therefore AFFIRM the district court's judgment. We note once again in closing that the EPA's decision in each case seeking TAS status is fact-specific. In this case, both parties conceded that the waters within the Band's reservation are very important to the Band's economic and physical existence. Additionally, the reservation here is unusual in that there are no parcels of fee land within the reservation owned by non-members of the tribe. We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe's "inherent authority" to affect off-reservation activities so far as to go beyond the standards of the statute or the regulations. If it ever arises, that will be another case, for another day.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 96-C-90

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and
CAROL BROWNER,

Defendants,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant.

ORDER GRANTING EPA'S MOTION FOR SUMMARY JUDGMENT (DOC. #49); GRANTING SOKAOGON CHIPPEWA COMMUNITY'S MOTION FOR SUMMARY JUDGMENT (DOC. #59); DENYING STATE OF WISCONSIN'S MOTION FOR SUMMARY JUDGMENT (DOC. #65) AND DISMISSING CASE

Before the court is the Environmental Protection Agency's (EPA) Motion for Summary Judgment (Doc. #49); the Sokaogon Chippewa Community's Motion for Summary Judgment (Doc. #59); and the State of Wisconsin's Motion for Summary Judgment (Doc. #65). For the reasons set forth herein, summary judgment will be granted to the EPA and

Sokaogon Chippewa Community (Sokaogon). The State of Wisconsin's summary judgment motion will be denied.

I. BACKGROUND

This case involves a challenge to the EPA's grant of "treatment as state" (TAS) status to the Sokaogon Chippewa Community pursuant to § 1377(e) of the Clean Water Act. That section authorizes the EPA to treat Indian tribes as states in promulgating water quality standards. Wisconsin contends that the EPA exceeded its authority by granting the Sokaogon Chippewa Community TAS status; the EPA and Sokaogon Tribe request an order upholding the EPA's decision.

A. The Clean Water Act

The Clean Water Act (CWA) prohibits discharges from a point source of any pollutant into waters unless the emission discharge complies with the Act's requirements. See 33 U.S.C. § 1311(a). For most discharges, such compliance is achieved by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit. See 33 U.S.C. § 1342. NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, by a state agency subject to EPA review. See 33 U.S.C. § 1342(b).

Under the NPDES program, each state must adopt water quality standards (WQS) for its waters, subject to review and approval by EPA. See 33 U.S.C. § 1313(a)-(c). Once WQS have been adopted, EPA will issue an NPDES permit provided the relevant state certifies that any discharges under the proposed permit will be consistent with its WQS. See 33 U.S.C. § 1341(a).

In 1987, Congress added § 1377(e) to the CWA thereby authorizing EPA to permit tribes "to be treated as a state" for purposes of promulgating WQS. Section 1377(e) states:

> The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II . . . to the degree necessary to carry out the objectives to this section, but only if –
>
> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Section 1377(h) defines Federal Indian reservation as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . .."

After notice and an opportunity to comment, EPA issued a rule in 1991 enumerating the standards for processing tribal requests for TAS status. See 56 Fed. Reg. 64,876 (1991). The Rule requires:

1. The tribe must be federally recognized and exercising governmental authority;

2. The tribe must have a governing body carrying out "substantial governmental duties and powers";

3. The water quality standards program which the tribe seeks to administer must "pertain to the management and protection of water resources," which are "within the borders of an Indian reservation;"

4. The Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations.

See 40 C.F.R. § 131.8(a).

B. The Sokaogon Chippewa Community

The Sokaogon Chippewa Community is a Native American tribe previously known in the past as the Sokaogon Band, the Mole Lake Band, the Post Lake Band, the Rice Lake Band, the Pelican Lake Band, the Lake Bands and the Lost Band. Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 685 (E.D. Wi. 1992). The Sokaogon Chippewa are descendants of the Lake Superior

Chippewa tribes that roamed the Northern Wisconsin area before white settlement in the early to mid-1800's. Id.

For reasons not relevant here, the Sokaogon Chippewa were a nomadic tribe and did not receive their own reservation land until the 1930's. In 1934, the Indian Reorganization Act authorized the Secretary of the Interior to purchase new lands and turn them into Indian reservations. 25 U.S.C. §§ 465, 467. Thereafter, the Sokaogon received 1,437 acres in Forest County, Wisconsin, in 1939, and additional land in that area in 1982. This area is designated as the Mole Lake Reservation. Sokaogon Chippewa Community, 805 F. Supp at 690. Unlike many reservations today, the reservation lands are owned wholly by the United States in trust for the Sokaogon Tribe. There are no non-Indian lands owned in fee by non-members of the Tribe. See Montana v. United States, 450 U.S. 544 (1981).

On August 13, 1994, the Sokaogon Tribe filed an application for treatment as a state under § 1377 of the Clean Water Act.

C. The State of Wisconsin's objection

The State of Wisconsin objected to the Sokaogon Tribe's TAS application arguing that it enjoys sovereignty over all navigable waters located within state boundaries by virtue of the Public Trust and Equal Footing Doctrines. Before Wisconsin became a state, the United States held these interests in trust for the public pursuant to a 1783 deed of cession by four of the original 13 states and the Northwest Ordinance of 1787. Wisconsin received these interests upon admission to the Union pursuant to the Wisconsin Enabling Act of 1846, 9 Stat. 56, and the Act of March 3, 1847, 9 Stat. 178. Because the Mole Lake Reservation was not created until roughly 91 years later, the State contends the Tribe never acquired ownership of navigable water beds and cannot regulate within those beds under § 1377(e)(2).

The State relies heavily on State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). In that case, it sought a declaratory judgment that fishing and hunting restrictions set by the Chippewa Indians on their reservation infringed the general public's right to use navigable state waters. Wisconsin asserted property interests in those waters as trustee for the public. The Seventh Circuit concluded that the 1854 treaty which created the Chippewa reservation did not explicitly divest the state of its interest in navigable waters, and there was no public exigency at the time the treaty was signed warranting such an inference. Id. at 1334-35. Thus, the court concluded that the State retained exclusive sovereignty over waters within the reservation. Id. at 1335.

The State also relied on Montana v. United States, 450 U.S. 544 (1981). In Montana, the Supreme Court stated:

> The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River. The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.
>
> Though the owners of land riparian to nonnavigable streams may own the adjacent riverbed, conveyance by the United States of land riparian to a navigable river carries no interest in the riverbed. Rather, the ownership of land under navigable waters is an incident

> of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce . . ..
>
> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Id. at 550-52 (citations omitted).

Based on the foregoing, the State asserts that the Sokaogon Tribe may not set water quality standards within the boundaries of its reservation because it does not hold title to those waters. Furthermore, the State challenges EPA's conclusion that the Sokaogon Tribe is capable of implementing a water quality standards program.

Alternatively, the State contends that the EPA's decision violates the establishment clause by reposing regulatory authority in entities that intend to base decision making, at least in part, on religious and spiritual principles.

Standard of Review

On September 29, 1995, the EPA approved the Tribe's application for TAS status, concluding that the Tribe had satisfied all requirements of C.F.R. § 131.8, including demonstrating its authority over all water resources on the reservation. That decision is at issue here.

The Administrative Procedure Act commands reviewing courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[1] 5 U.S.C. §

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[1] Title 5 U.S.C. § 706(2) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

706(2)(A). In Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984), the Supreme Court established a two-step approach to judicial review of agency interpretations of acts of Congress. First, the reviewing court must determine whether there is a clear and unambiguous congressional intent concerning the precise question at issue. If congressional intent is clear and unambiguous, then that intent must be given effect. A reviewing court proceeds to the second step "if the statute is silent or ambiguous with respect to the specific issue." Id. at 842-843. Then, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id.

This court must also give substantial deference to an agency's interpretation of its own regulations. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-151 (1991). This court's task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). In other words, the court must defer to the secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at

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(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

It is uncontested that the present controversy is not controlled by §§ 706(2)(E) or 706(2)(F), which primarily apply in cases involving either agency rulemaking or adjudication. Nor is there a claim that the EPA exceeded its constitutional authority under § 706(2)(B) or its statutory authority under § 706(2)(C).

the time of the regulation's promulgation." Gardebring v. Jenkins, 485 U.S. 415, 430 (1988).

II. CONCLUSIONS OF LAW

A. The EPA's grant of TAS status to the Sokaogon Tribe was not arbitrary, capricious, an abuse of discretion or contrary to law.

The court concludes that the EPA's grant of TAS status to the Sokaogon Tribe must be upheld. After careful review of the administrative record in this case, the court cannot conclude that the EPA's decision was "arbitrary, capricious, an abuse of discretion or contrary to law."

As an initial matter, the court concludes that the administrative record supports the EPA's conclusion that the Sokaogon Tribe is federally recognized and exercising governmental authority. Under the Wheeler-Howard Act of June 1934, the Sokaogon Chippewa Community became a federally recognized tribe with a governing body operated under a Constitution and by-laws. The Charter of Incorporation to the Sokaogon Chippewa Community was ratified and became effective on October 7, 1939.

The administrative record also supports the EPA's conclusion that the Sokaogon Tribe has a governing body carrying out "substantial governmental duties and powers". The Band's government includes a Tribal Council, which carries out executive and legislative functions, pursuant to a Constitution and by-laws.

The EPA's conclusion that the Sokaogon Tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean

Water Act and regulations is also amply supported by the record. The EPA concluded:

> [T]he Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of management and technical skills, by the existence of institutions to exercise executive, legislative and judicial functions, by a history of successful managerial performance of public health and environmental programs, and by acceptable accounting and procurement procedures.
>
> The Mole Lake Band demonstrates the requisite management and technical skills and history of successful management and technical skills and history of successful management performance through its existing environmental programs. The Band has maintained a multi-media environmental office for 4 years, with the addition of staff expertise in the areas of water quality, data management and planning. The Band has received numerous grants under the Clean Water Act, Resource Conservation and Recovery Act, the Clean Air Act and the Indian General Assistance Program. At the present time, the Tribal environmental department is performing reservation-wide monitoring of its surface waters, air quality and ground water. In addition, the Band has been working on the development of a water quality standards program for several years with financial and technical assistance from the Region. The band has submitted several

> well-written drafts of the water quality standards regulations to the Region for review and comment and held a formal public hearing to gather comments on its water quality standards . . ..

The State argues that the EPA erred in concluding that the Sokaogon Tribe satisfied the capability requirement because the tribe failed to demonstrate that it will provide adequate judicial review of certification decisions. The court disagrees. The EPA expressly concluded that "the Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of . . . institutions to exercise . . . judicial functions . . .." The administrative record supports this finding and the decision is entitled to deference.

Furthermore, the administrative record supports the EPA's conclusion that the water quality standards program which the Tribe seeks to administer pertains to the management and protection of water resources within the borders of an Indian reservation. See 40 C.F.R. § 131.8(a)(1). Although it is unclear what Congress intended when it enacted § 1377(e)(2), EPA's construction of this section is reasonable and permissible.

Section 1377(e) permits a Tribe to be treated as a state for purposes of the Clean Water Act if:

> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on

> alienation, or otherwise within the borders of an Indian reservation . . ..

33 U.S.C. § 1377(e)(2) (emphasis added).

When reading § 1377(e)(2) it is uncertain whether Congress intended Indian Tribes to have some kind of ownership interest in the water resources to be regulated, or whether Congress intended that Tribes regulate all water within their reservations, regardless of ownership. Nevertheless, the EPA's construction of this section is reasonable and permissible. In promulgating the regulation construing this section, the EPA concluded that a tribe must show that the "water quality standards program which the tribe seeks to administer must 'pertain to the management and protection of water resources,' which are 'within the borders of an Indian reservation.'" See 40 C.F.R. § 131.8(a)(1). Although the EPA recognized that tribes generally possess the authority to regulate activities affecting water quality on their reservation, it acknowledged that the Clean Water Act does not grant additional authority to tribes. See 56 Fed. Reg. at 64,880.

Moreover, the EPA's regulations indicate that applications by Tribes will be supplemented by its two general findings regarding the effects of water pollution on reservations. First, the EPA found that the CWA contains an implicit congressional finding that impacts to water quality constitute potential serious and substantial effects on human health and welfare. 56 Fed. Reg. at 64,878. Furthermore, the EPA also determined that activities on fee lands within a reservation will likely impact the quality of waters on the tribal portions of the reservation.[2] 56 Fed. Reg. at 64,878.

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[2] The EPA stated:

> [B]ecause of the mobile nature of pollutants in surface waters and the relatively small length/size of stream

The EPA also expressed its intent to rely on Montana v. United States, 450 U.S. 544 (1981), and its progeny in examining TAS applications. See 56 Fed. Reg. at 64, 880. In Montana, the Supreme Court concluded that absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation. Montana, 450 U.S. at 564. In certain circumstances, however, even where Congress has not expressly authorized it, Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands. Id. at 566. The first exception to the general rule relates to non-members who enter consensual relationships with the tribe or its members. The second concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." See also Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989).

Notwithstanding the absence of non-member fee lands on the Mole Lake Reservation, the EPA relied on Montana's second exception in concluding that the Sokaogon Tribe possessed inherent regulatory authority over the water within its reservation.

> segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality.

56 Fed. Reg. at 64,878.

The reservation today consists of approximately 1850 acres, all of which are in trust status. The reservation land is very water rich, with many acres and miles of surface water and wetland habitat. The Band is very much reliant upon these resources, which sustain their lives and their culture physically, and are integral to the Band's cultural identity. The resources provide the Band with a reliable source of food, fresh water, medicines and raw materials, while at the same time nurturing culturally important practices such as traditional hunting, fishing and gathering. Therefore, the Band's intention to protect and regulate water quality within the reservation is consistent with the desire to safeguard these resources.

The largest area of surface water on the reservation, Rice Lake, covers 320 acres with an additional 320 acres of adjacent wetland habitat . . . Rice Lake is wholly contained within the reservation boundaries and is prime habitat for the largest single strand of inland emergent wild rice in the world. Wild rice serves as the foundation for the Band's diet, as it has for centuries. The Rice Lake rice is also critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed. Although the relationship between wild rice and water quality is only beginning to be fully understood, it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e., degradation. The Band's water quality

> standards provide a mechanism for protecting this important resource.
>
> Swamp Creek, which flows through the reservation, contains a diverse assemblage of both cold and warm water species. At its confluence with Rice Lake, it is considered a high quality cold water habitat; as it leaves Rice Lake it is designated as a high quality warm water habitat. Swamp Creek feeds Rice Lake, accounting for nearly 35 percent of the total volume of water in the lake.
>
> In addition, other surface water resources within and/or partially within the reservation include: Gliske Creek, a cold water trout stream supporting naturally viable brook and brown trout; Logan Creek and Amuck Creek, both cold water streams; and, Bishop Lake, a warm water habitat. There are also large wetland complexes adjacent to each of these resources, as well as isolated wetlands.

The EPA further concluded that the Sokaogon Tribe has the authority to regulate the water resources within the reservation:

> EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation. The answer to this question depends upon a detailed analysis of Congressional intent at the time of creation of the Mole Lake Reservation. The State's citation to the decision in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) . . . is of limited value here, since it deals with a different reservation

. . . and thus different historical circumstances. Nonetheless, EPA need not resolve this issue since, even if the State did retain title to the beds of the Mole Lake Reservation, EPA could, for the reasons expressed below, properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA.

[U]nder Section 518 of the CWA, Congress clearly expressed its intent to permit Tribes to regulate waters located within the exterior boundaries of Indian reservations where they can demonstrate the authority and capability to do so. All lands within the Reservation, including those riparian to the navigable waters for which the Band intends to set standards, are held in trust for the Band by the Federal government. Of course, the Band clearly has regulatory authority over all members of the Band. Since all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters.

Furthermore, we understand that, as a matter of the common law of Wisconsin, while the State may retain title under the equal footing doctrine to the beds of navigable lakes, title to the beds of navigable rivers, streams, or creeks has subsequently passed to the riparian land owner, subject to any restrictions imposed by the public trust doctrine . . ..

> In light of this pattern of ownership, we believe it is largely irrelevant whether the Band could "control the activities" of non-members who might be present on lakes within the Reservation if the State holds title to the lake beds and grants access thereto. We think the likelihood that such activities have occurred or have had any impact on water quality is remote. The factual situation suggests that the Band can adequately regulate virtually all activities which might affect the quality of Reservation waters . . ..

This conclusion is consistent with § 1377(e)(2) and related EPA regulations. Although the court questions whether Congress intended such a result, both the statute and legislative history are ambiguous and the EPA was charged with administering the CWA. The EPA's construction is reasonable and permissible.

Two points are worthy of note. First, the EPA is entitled to considerable deference in its interpretation of the Clean Water Act because it is charged with administering the Act. See Chevron, 467 U.S. at 844; Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992). In the Clean Water Act, Congress provided the EPA with "substantial statutory discretion." Arkansas, 503 U.S. at 107. Second, it is a deeply rooted principle of the Supreme Court's Indian jurisprudence that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

B. The State of Wisconsin's Establishment Clause Claim is Without Merit.

Alternatively, the State argues that permitting the Sokaogon Tribe to administer the WQS program, given the prominent role of religion in its regulatory program, violates the establishment clause. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion . . .." U.S. Const. amend. I. Government action does not violate the Establishment Clause if "[t]he challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993).

The State of Wisconsin's Establishment Clause claim is premature. This case is not a challenge to any particular water quality standards. Instead, the State challenges EPA's approval of the Sokaogon Tribe's application for authority to develop such standards. As a result, the State's Establishment Clause claim is rejected.

Now, therefore,

IT IS ORDERED that Environmental Protection Agency's (EPA) Motion for Summary Judgment (Doc. #49) is granted.

IT IS FURTHER ORDERED that the Sokaogon Chippewa Community's Motion for Summary Judgment (Doc. #59) is granted.

IT IS FURTHER ORDERED that the State of Wisconsin's Motion for Summary Judgment (Doc. #65) is denied.

Dated at Milwaukee, Wisconsin, this 28th day of April, 1999.

BY THE COURT

/s/
C. N. CLEVERT
U. S. District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 96-C-90

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and
CAROL BROWNER,

Defendants,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant.

This action came before the court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed.

APPROVED: ____________________
C.N. CLEVERT
U. S. District Judge

SOFRON B. NEDILSKY
Clerk

4-28-99 /s/
Date *(By) Deputy Clerk*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

Sep 29 1995

REPLY TO THE ATTENTION OF

R-19J

Mr. Arlyn Ackley, Sr.
Tribal Chairman
Mole Lake Band of the
Lake Superior Chippewa
Sokaogon Chippewa Community
Route 1, Box 625
Crandon, Wisconsin 54520

Dear Mr. Ackley:

It is my pleasure to inform you of my decision to approve the application of the Mole Lake Band of the Lake Superior Chippewa, Sokaogon Chippewa Community, to administer the water quality standards program pursuant to the Clean Water Act, Section 303.

The Mole Lake Band has satisfied all of the requirements set forth at the Code of Federal Regulations, Title 40, Part 131.8, "Requirements for Indian Tribes to be treated as States for purposes of water quality standards", including demonstrating its authority over all water resources on the reservation.

The Sokaogon Chippewa Community's water quality standards will be approved under separate cover pending receipt of United States Fish and Wildlife Service concurrence.

I have attached a copy of the memorandum from Robert Perciasepe, Assistant Administrator for the Office of Water, which concurs with my decision.

If you have any questions or would like additional information, please contact Ms. Claudia Johnson-Schultz at (312) 886-6108.

Sincerely yours,

/s/
Valdas V. Adamkus
Regional Administrator

Enclosure

cc: Mr. George Meyer, Secretary, Wisconsin DNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

Aug 28 1995

Office of
Water

MEMORANDUM

SUBJECT: Application for Mole Lake Band of the Lake Superior Tribe of Chippewa Indians for Authority to Administer the Water Quality Standards Program

FROM: Robert Perciasepe /s/
Assistant Administrator

TO: Valdas V. Adamkus
Regional Administrator, Region V

I am pleased to inform you that I have approved the application from the Mole Lake Band, requesting authority to administer the water quality standards program under Section 303 of the CWA, as required under the Agency's Delegation of Authority No. 2-78 and you may so notify the Tribe.

The Mole Lake Band received "treatment as a State" status for Section 106 on June 29, 1992. Therefore, the Tribe need only: (1) describe the agency which will assume primary responsibility to establish, review, implement and revise water quality standards; and (2) describe the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The Mole Lake Band has demonstrated they have the needed staff to administer the program, and they have authority over water resources on the reservation.

I have attached a copy of the Office of General Counsel's and Office of Enforcement's concurrence memoranda for your records.

Should you have any questions or need further information, you may have your staff contact Dave Sabock of the Water Quality Standards Branch at 260-1315.

Attachments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Application for the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians for Authority to Administer the Water Quality Standards Program

FROM: Elaine G. Stanley, Director /s/
Office of Compliance

TO: Robert Perciasepe
Assistant Administrator for Water

Our review of the application for the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians for authority to administer a water quality program under Section 303 of the Clean Water Act indicates that no enforcement issues are raised. In accordance with section 2-78 of the Delegations Manual, dated April 3, 1989, the Office of Enforcement and Compliance Assurance concurs on the application of the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians to conduct a water quality standards program under Section 303 of the Clean Water Act.

cc: Kenneth A. Fenner, Region V
James J. Havard, OGC

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

Aug 22 1995

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Application of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians for Treatment In the Same Manner as a State under Section 303 of the Clean Water Act – REQUEST FOR CONCURRENCE

FROM: Jonathan Z. Cannon /s/
Assistant Administrator (General Counsel)

TO: Robert Perciasepe
Assistant Administrator for Water

Region V has requested the concurrence of the Office of Water in the Region's decision to approve the application of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians (the Band) for treatment in the same manner as a State under Section 303 of the Clean Water Act (CWA). The concurrence of the Office of General Counsel is also required under the Agency's Delegation of Authority No. 2-78 because it is the first section 303 application from an Indian Tribe in Region V.

Background

Section 518(e)(2) of the CWA specifies that, in order to qualify for treatment in the same manner as a State, a

Tribe must demonstrate that it: (1) is a federally recognized Tribe, (2) has a governing body carrying out substantial governmental duties and powers, (3) has adequate authority over water resources within a reservation, and (4) is reasonably expected to be capable of administering the program the Tribe is seeking to administer. EPA regulations at 40 CFR § 131.8 require a Tribe to submit an application which demonstrates that it meets each of these four criteria. If a Tribe has previously submitted an application for approval under another EPA program, it need only submit any additional information unique to the current program. 40 CFR § 131.8(b)(6).

OGC Review

We reviewed the Band's application and supporting documents, the Regional Administrator's memorandum outlining his proposed eligibility determination, and the analysis of the Region V Office of Regional Counsel (ORC). We note that the Band has already been approved for treatment in the same manner as a State under Section 106 of the CWA.

A. Federal Recognition/Substantial Duties and Powers

In approving the Band's Section 106 application, the Agency previously determined that the Band is federally-recognized and possesses a government exercising substantial duties and powers. We concur in the Region's finding that these requirements continue to be met.

B. Jurisdiction

The Band seeks approval for waters that are within its Reservation. All lands within the Reservation are held in trust for the Band by the Federal government. ORC has found, and the State of Wisconsin has not disputed, that the

Band has authority over the activities of Band members on those trust lands that may impact the quality of Reservation waters. We concur in this finding.

The State, however, questions "the ability of the [B]and to control the activities of others on any public waterways that are held to be within its reservation," in light of the equal footing and public trust doctrines. Letter from George E. Meyer, Secretary, State of Wisconsin Department of Natural Resources to Valdas V. Adamkus, Regional Administrator, EPA Region IV (sic), December 7, 1994. The State argues that it owns the beds of navigable waters within the Reservation pursuant to the equal footing doctrine. In addition, the State asserts that any claim of authority the Band has over waters and waterbeds is subject to the public trust doctrine, which charges the State with the duty of administering and protecting all navigable waters within the State for the good of the public.

The ORC memo of May 19, 1995 concludes, and we agree, that EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation. The answer to this question depends upon a detailed analysis of Congressional intent at the time of creation of the Mole Lake Reservation. The State's citation to the decision in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) (finding State sovereignty over navigable waters within an Indian reservation), is of limited value here, since it deals with a different reservation (the Lac Court Oreilles) and thus different historical circumstances. Nonetheless, EPA need not resolve this issue since, even if the State did retain title to the beds of the Mole Lake Reservation, EPA could, for the reasons expressed below, properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA.

As discussed in the ORC memo, under Section 518 of the CWA, Congress clearly expressed its intent to permit Tribes to regulate waters located within the exterior boundaries of Indian reservations where they can demonstrate the authority and capability to do so. All lands within the Reservation, including those riparian to the navigable waters for which the Band intends to set standards, are held in trust for the Band by the Federal government. Of course, the Band clearly has regulatory authority over all members of the Band. Since all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters.

Furthermore, we understand that, as a matter of the common law of Wisconsin, while the State may retain title under the equal footing doctrine to the beds of navigable lakes, title to the beds of navigable rivers, streams, or creeks has subsequently passed to the riparian land owner, subject to any restrictions imposed by the public trust doctrine. On the Mole Lake Reservation, title to the beds of the streams and creeks, even if once possessed by the State, has now passed to the Band (as beneficial owner of the trust lands). Thus, the Band may also exercise regulatory authority over all activities occurring on the creeks within the Mole Lake Reservation even if once held by the State.

In light of this pattern of ownership, we believe it is largely irrelevant whether the Band could "control the activities" of non-members who might be present on lakes within the Reservation if the State holds title to the lake beds and grants access thereto. We think the likelihood that such activities have occurred or have had any impact on water quality is remote. The factual situation suggests that the Band can adequately regulate virtually all activities which might affect the quality of Reservation waters. We also doubt that, in the case of a reservation such as this one, where all the lands (except perhaps those within the navigable waters themselves) are Tribal trust lands, a court would even find the need to examine the scope of Tribal authority over non-members' activities (since there are no non-Indian lands owned in fee by non-members, only lands arguably owned by the State).

Nonetheless, even if the scope of the Band's authority over non-members' activities were relevant here, we believe that the Band could easily establish jurisdiction by showing that the effect of the activities of such non-members on the health and welfare of the Band would be "serious and substantial." EPA has already determined that, as a general matter

> because of the mobile nature of pollutants in surface waters and the relatively small size of . . . water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands.

56 Fed. Reg. 64,876, 64,878 col 3. (Dec. 12, 1991). Furthermore, the CWA reflects a Congressional determination that activities which impair water quality have a serious and substantial impact on health and welfare. This generalized finding seems especially appropriate where, as on the Mole Lake Reservation, all or virtually all lands are Tribal or trust lands. In addition, the Mole Lake decision package demonstrates that the Band is very much reliant on the availability of the water resources within the Reservation, as these resources sustain the lives of the Band and are integral to the Band's cultural integrity. In particular, Rice Lake, the largest water body, is a prime source of wild rice

which serves as a significant diet and economic resource for the Band. Memo from Valdas V. Adamkus, Regional Administrator, to Robert Perciasepe, Assistant Administrator for Water, June 2, 1995. Thus, any activities of nonmembers in the navigable waters of the Reservation which would impair the water quality could be expected to have a serious and substantial effect on the health and welfare of the Band.

For these reasons, we support the conclusion of the ORC that the Band has demonstrated adequate jurisdiction to administer the Section 303 water quality standards program.

C. Capability

Region V has concluded that the Band satisfies the capability requirement. Because this is a factual question best addressed by the EPA office with the greatest experience working with the Band, we defer to the Region's conclusion.

Conclusion

Based on our review, we concur in the Region's determination that the Band may be treated in the same manner as a State for purposes of section 303 of the CWA.

cc: Valdas V. Adamkus
Steven A. Herman

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2001

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 99-2618

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY and CHRISTIE WHITMAN,[*],
Defendants-Appellees,

and

SOKAOGON CHIPPEWA COMMUNITY,
Intervening Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 96-C-90

Charles N. Clevert,
Judge

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[*] Pursuant to Fed. R. App. P. 43(c), Christie Whitman is substituted as a party for Carol M. Browner.

ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed in the above matter by counsel for the plaintiff-appellant, all members of the original panel voted to **DENY** rehearing. No judge in regular active service requested a vote on rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is **DENIED.**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

Jun 2 1995

REPLY TO THE ATTENTION OF

R-19J

MEMORANDUM

SUBJECT: Proposed Water Quality Standards Program of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community

FROM: Valdas V. Adamkus
Regional Administrator

TO: Robert Perciasepe
Assistant Administrator for Water (4101)

This memorandum is to request your concurrence on my decision to grant the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community (the "Band") "treatment as a State" status for the Clean Water Act's Water Quality Standards program. As set forth below, the Band meets all of the statutory and regulatory criteria for such treatment. To assist you in making your determination, I am attaching a complete package of information for your review.

Background: The Mole Lake Reservation is located in Forest County in northeastern Wisconsin. The reservation today consists of approximately 1850 acres, all of which are in trust status. The reservation land is very water rich, with many acres and miles of surface water and wetland habitat. The Band is very much reliant upon these resources, which sustain their lives and their culture physically, and are integral to the Band's cultural identity. The resources provide the Band with a reliable source of food, fresh water, medicines and raw materials, while at the same time nurturing culturally important practices such as traditional hunting, fishing and gathering. Therefore, the Band's intention to protect and regulate water quality within the reservation is consistent with the desire to safeguard these resources.

The largest area of surface water on the reservation, Rice Lake, covers 320 acres with an additional 320 acres of adjacent wetland habitat. A map has been attached for your reference [Attachment 1]. Rice Lake is wholly contained within the reservation boundaries, and is prime habitat for the largest single stand of inland emergent wild rice in the world. Wild rice serves as the foundation for the Band's diet, as it has for centuries. The Rice Lake rice is also critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed. Although the relationship between wild rice and water quality is only beginning to be fully understood, it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e., degradation. The Band's water quality standards provide a mechanism for protecting this important resource.

Swamp Creek, which flows through the reservation, contains a diverse assemblage of both cold and warm water species. At its confluence with Rice Lake, it is considered a high quality cold water habitat; as it leaves Rice Lake it is designated as a high quality warm water habitat. Swamp Creek feeds Rice Lake, accounting for nearly 35 percent of the total volume of water in the lake.

In addition, other surface water resources within and/or partially within the reservation include: Gliske Creek, a cold water trout stream supporting naturally viable brook and brown trout; Logan Creek and Amuck Creek, both cold water streams; and, Bishop Lake, a warm water habitat. There are also large wetland complexes adjacent to each of these resources, as well as isolated wetlands.

Statutory and Regulatory Requirements: Section 518(e) of the Clean Water Act sets forth the requirements for a Tribe to be treated as a State for the Water Quality Standards program. Regulations implementing that Section are promulgated at 40 C.F.R. Part 131.8. The Band and the Region have met all substantive and procedural requirements of Part 131.8, as explained below:

> Section 131.8(a)(1) and (2): Federal Recognition; Governmental Functions. These requirements are identical to the Federal recognition and governmental functions requirements for the Clean Water Act Section 106 and 314 programs. Since the Band has already demonstrated that it meets these requirements for the Clean Water Act Section 106 and Section 314 programs [Attachments 2 and 3], it does not have to demonstrate that it meets these requirements for this program. 59 Fed. Reg. 64,340 (December 14, 1994). 40 C.F.R. Part 131.8(b)(6).
>
> Section 131.8(a)(3): Jurisdiction. The Band has demonstrated that the functions to be performed in regulating the water quality of the surface water resources are within its jurisdiction. Specifically, all lands within the reservation are held in trust for the Band by the United States and all of the water resources lie within the reservation boundaries. During its comment period, the State of Wisconsin raised a competing claim of jurisdiction regarding the status of land title to the beds of navigable waters.

After consultation with the Office of General Counsel and the Department of the Interior, the Office of Regional Counsel has determined that the State's argument lacks merit and that the Band has adequate jurisdiction to receive program authorization. [Attachment 4].

Section 131.8(a)(4): Capability. In my judgement, the Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of management and technical skills, by the existence of institutions to exercise executive, legislative, and judicial functions, by a history of successful managerial performance of public health and environmental programs, and by acceptable accounting and procurement procedures.

The Mole Lake Band demonstrates the requisite management and technical skills and history of successful management performance through its existing environmental programs. The Band has maintained a multi-media environmental office for 4 years, with the addition of staff expertise in the areas of water quality, data management and planning. The Band has received numerous grants under the Clean Water Act, Resource Conservation and Recovery Act, the Clean Air Act and the Indian General Assistance Program. At the present time, the Tribal environmental department is performing reservation-wide monitoring of its surface waters, air quality and ground water. In addition, the Band has been working on the development of a water quality standards program for several years with financial and technical assistance from the Region. The Band has submitted several well-written drafts of the water quality standards regulations to the Region for review and comment and held a formal public hearing to gather comments on its water quality standards on May 13, 1995.

The Band's government includes a Tribal Council, which carries out executive and legislative functions, and a Tribal Court, which carries out judicial functions.

The Region's oversight of Agency grants administered by the Band confirms the acceptability of the Band's accounting and procurement procedures established in past treatment as a State applications.

Section 131.8(b): Completeness of Application. The August 13, 1994, application submitted by the Band contains all of the elements required by the Agency regulations as simplified by EPA's December 12, 1994, Final Rule on Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 40 C.F.R. Part 131.8(b)(6): a narrative statement describing the capability of the Band to administer an effective water quality standards program, including a description of the existing staff who will assume primary responsibility for establishing, reviewing implementing and revising water quality standards; and a description of the technical and administrative capabilities of that staff. [Attachment 5].

Section 131.8(c): Application Processing. The Region promptly notified the Band of receipt of its application and, within 30 days, also notified the State of Wisconsin. The notification to the State included information on the substance and basis of the Band's assertion of authority to regulate the quality of reservation waters. As set forth in the previously cited opinion of the Office of Regional Counsel, the State of Wisconsin raised a competing

> claim of jurisdiction, and the State and Band submitted comments in support of their positions. Based upon these comments and the opinion of the Office of Regional Counsel, I have determined that the Band has adequately demonstrated that it meets the requirements of 40 C.F.R. Part 131.8(a)(3).

In sum, I recommend the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community for "treatment as a State" under the Water Quality Standards program. My staff and I believe that the Band is capable and experienced in environmental program management and implementation and possesses a genuine interest in environmental protection. It is my determination, as Regional Administrator, that the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community meets all the applicable statutory and regulatory requirements for treatment as a State and is thus eligible to submit a water quality standards package for approval by the Region. I request your formal concurrence on this determination.

If you should have any questions regarding the information submitted, please contact Barry DeGraff, acting Director of the Water Division, at 312/353-2147.

/s/ ____________________
Valdas V. Adamkus

Attachments

CONCUR: ____________________ ________
Robert Perciasepe Date
Assistant Administrator for Water

NON
CONCUR: ____________________ ________
Robert Perciasepe Date
Assistant Administrator for Water

Attachment 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 19 1995

REPLY TO THE ATTENTION OF

CM-29A

MEMORANDUM

SUBJECT: Authority of the Mole Lake Band of the Lake Superior Chippewa Indians, Sokaogon Chippewa Community, to Regulate the Quality of Reservation Waters

FROM: Marc M. Radell
Associate Regional Counsel

THROUGH: Gail C. Ginsberg
Regional Counsel

TO: Valdas V. Adamkus
Regional Administrator

After reviewing the assertion by the Mole Lake Band of the Lake Superior Chippewa Indians, Sokaogon Chippewa Community (the "Band") of the authority to regulate the quality of reservation waters and the competing claim of jurisdiction raised by the State of Wisconsin, the Office of Regional Counsel believes that the Band has the authority it asserts. We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c) (4), you determine that the Band has adequately demonstrated that it meets the jurisdictional requirements of

40 C.F.R. § 131.8(a) (3). In reaching our opinion, ORC consulted with the Office of General Counsel and the Department of Interior's Office of the Solicitor.

On August 13, 1994, the Band submitted an application to the Region for "treatment as a State" for the Clean Water Act Section 303 water quality standards program. On November 4, 1994, the State of Wisconsin raised a competing claim of jurisdiction on the application and requested an additional 90 days to supplement its comments [Attachment 1]. On November 18, 1994, you provided the Band with a copy of the State's competing claim and provided both parties until December 5, 1994 to submit additional comments on the issue. The Band and State submitted additional comments to the Region on December 5 and 7, respectively [Attachments 2 and 3].

The State of Wisconsin asserts that, pursuant to the equal footing doctrine and the Northwest Ordinance of 1787, it gained ownership of all lake beds within its borders when it achieved statehood in 1848. The State also argues that the 1939 Executive Order creating the reservation does not expressly convey the lake beds to the Band and exigent circumstances which would suggest that conveyance was implicit in the creation of the reservation did not exist at the time of the Executive Order. In the absence of such express conveyance or exigent circumstances, the State maintains, the lake beds could not have been transferred from State ownership. Finally, the State asserts that any claim of authority the Band has over streams and streambeds is subject to the Public Trust Doctrine, which charges the State with the duty of administering and protecting all navigable waters within the State for the good of the public.

After consultation with the Office of General Counsel and the Department of the Interior's Office of the Solicitor, ORC believes that we need not reach the issue of ownership of water beds within the reservation to resolve the competing claim of jurisdiction. The statutory scheme of the Clean Water Act does not link ownership of lake beds with regulation of water quality. Rather, the Act contemplates geographic location of the water resources as the determinative factor. Section 518(e) (2) of the Act clearly expresses Congress's intent that American Indian Tribes are the appropriate authorities to manage and protect water resources within reservations. Therefore, we do not reach the issue of whether the State owns lake beds within the Mole Lake reservation. In addition, we believe that the Congressional intent that Tribes regulate water quality within reservations preempts any claim that the State may have under the Public Trust Doctrine to regulate the water quality of streams within the reservation. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

For these reasons, we believe that the Band has the authority to regulate water quality within its reservation and recommend that, pursuant to 40 C.F.R. § 131.8(c) (4), you determine that the Band has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a) (3).

Attachments

cc: Jo Lynn Traub

ATTACHMENT 1

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
101 South Webster Street
Box 7921
Madison, Wisconsin 53707
TELEPHONE 608-266-2621
TELEFAX 608-267-3579
TDD 608-267-6897

November 4, 1994 M-2802

Mr. Valdas V. Adamkus
Administrator, Region V
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Il 60604-3590

SUBJECT: Mole Lake Band of the Lake Superior Tribe of Chippewa Indians Request for Authority under Section 303 of the Clean Water Act

Dear Mr. Adamkus:

On October 7, 1994 I received from you a letter dated October 5, 1994 regarding the above-referenced request for authority. You indicated in your letter that this agency has 30 days from the receipt of your letter to comment on possible competing claims of jurisdiction. This letter is intended to provide those comments. For the reasons stated below, we request an additional 90 days to finalize comments on this request.

Before I comment on possible issues of jurisdiction, I would like to comment generally on our relationship with the Chippewas.

For well over a decade the State of Wisconsin and the Chippewas have been involved in litigation and in less formal dispute resolution forums regarding how natural resources ought best be managed, and who should do the managing. While we may have differences on these issues, I am personally convinced that the Chippewas have a deep and abiding interest in the protection of these resources. With respect to implementation of the Clean Water Act, we have a strong interest in working with tribal authorities throughout Wisconsin to develop, where appropriate, mutually acceptable approaches to protection of water quality. Consequently, nothing which follows should be taken as a statement critical of the Mole Lake Band's interest in proper resource management.

As noted above, your request is for comments on "possible competing claims of jurisdiction." The Department does believe there may be a significant jurisdictional claim on behalf of the State that may inhibit application of section 303 status to Indian Tribes in Wisconsin.

Under what has come to be known as "Wisconsin's Public Trust Doctrine," the State of Wisconsin was granted title to the beds of all navigable waters in the state. The origin of this doctrine is found in the 1783 Virginia Act of Session, Northwest Ordinance, Act of July 13, 1787, article IV, I Stat. 51. Subsequent case law has held that state title to navigable waters superseded rights gained by the tribes in federal treaties which created their reservations. These state rights may preclude granting to tribes in Wisconsin Section 303 "State" designation.

As you can see, this is a complex legal issue. Rather than try to produce a final position within a short 30-day comment period, I am requesting that the Department be provided an additional 90 days from the date of this letter to complete our comments. I think this is a reasonable request, particularly in light of the fact that your letter only asked for an identification of "possible" claims of jurisdiction. I believe that it is in the best interests of everyone if we proceed to address this issue before proceeding further with a section 303 "State" designation. A 90 day period for completion of comments on this most important of issues seems very reasonable.

Sincerely,

/s/ "George"
George E. Meyer
Secretary

ATTACHMENT 2

SOKAOGON CHIPPEWA COMMUNITY
MOLE LAKE BAND
RT. 1, BOX 625
CRANDON, WISCONSIN 54520-9635
(715) 478-2604

December 5, 1994

Valdas V. Adamkus, Administrator
United States Environmental Protection Agency
Region-V
Regional Administrator's Office, 19th Floor, Metcalf Building
77 W. Jackson Blvd.
Chicago, IL 60604-3590

Subject: Mole Lake Band of the Lake Superior Chippewa Tribe, CWA Section 303 Treatment as A State (TAS) Application.

Dear Val:

Thank you for the opportunity to address the State of Wisconsin's comments on this Tribe's TAS application. I am encouraged to see that the approval process is moving ahead quickly. My legal staff has provided a summary response to the States competing claim of jurisdiction. This is attached for your review and consideration.

My staff has informed me that you will consult with the Department of Interior (DOI) on these matters. We respectfully request to be notified of all correspondence with DOI. We are confident that we are able to assist both your Agency and DOI as the consultation process proceeds.

The water quality standards we provided to you on November 18 are currently being reviewed based on comments from the water division. We hope to respond before the holidays.

We look forward to receiving TAS and program delegation in the near future. I will discuss this and other matters with you as we continue to work together toward improving Tribal relations with the Agency and the protection of the Reservation environments.

Sincerely,

/s/
Arlyn Ackley, Sr., Tribal Chairman
Mole Lake Band of the Lake Superior Chippewa
Sokaogon Chippewa Community

enc. TAS Response – Mole Lake Legal Department

SOKAOGON CHIPPEWA COMMUNITY
MOLE LAKE BAND
RT. 1, BOX 625
CRANDON, WISCONSIN 54520-9635
(715) 478-2604

Memorandum

To: Arlyn Ackley Sr., Tribal Chairman

CC: John Griffin/DuWayne Derickson

From: Legal Department

Date: December 5, 1994

Subject: Sokaogon Chippewa Community's Request for Program Authorization Under Clean Water Act Section 303.

In accordance with the November 18, 1994 EPA Region V letter, in which the agency requested information from the tribe by December 5, 1994, the following are reasons for the agency to reject the State of Wisconsin's (WDNR's) claim of competing jurisdiction, as that jurisdiction might apply to the tribe's right to gain "treatment as State" designation, and to the tribe's right to set water quality standards on waters within its reservation.

The WDNR, in its November 4, 1994 letter to the EPA, claims that the State of Wisconsin's Public Trust Doctrine, and accordingly the State of Wisconsin's title to beds of navigable waters within the State, "may preclude granting to tribes in Wisconsin Section 303 "State" designation." The State fails to recognize the specific purpose of the Clean Water Act, especially the 1987 amendments, which show the federal government's manifest intent to allow tribes to regulate water quality within the tribe's reservation.

By enacting the Federal Water Pollution Control Act, 33 U.S.C.S. § 1251, et. seq. (1994) (popularly known as the "Clean Water Act"), Congress declared its intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.S. § 1251(a)(1994). The "waters of the United States" encompass "bodies of waters wholly within a state whose use or misuse could affect interstate commerce." 40 C.F.R. § 230.3. By rule and by federal court decision, "waters of the United States" include waters overlying streams and lakebeds to which a state holds title. United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

The 1987 Amendments to the Clean Water Act added a new section 518 which required EPA to promulgate regulations specifying how the Agency would treat qualified Indian Tribes as States for the purposes of, among others, the § 303 (water quality standards) and § 401 (certification) programs. In its final rule, 40 C.F.R. pt. 131, (effective January 1, 1992) the EPA recognized the federal government's intent to allow Tribes to regulate surface water quality within the tribe's reservation. In promulgating its final rule, the EPA made the following comment on the tribe's right to set water quality standards:

> EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confined by the text and legislative history of section 518 itself...the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation

> water resources. As Senator Burdick, floor manager of the 1987 Clean Water Act Amendments explained, the purpose of section 518 was to "provide for clean water for the people of the Nation." 133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes" ...the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." Id., cited in 56 Fed. Reg. 64878-79 (1991). (emphasis added).

Because federal preemption principles apply, neither the Wisconsin Public Trust Doctrine, nor the State of Wisconsin's alleged ownership of the beds of navigable waters in Wisconsin allows the State to compete with the tribe's right, pursuant to federal legislation and agency rule, to receive "treatment as State" status, and to set surface water quality standards. Federal preemption occurs when a state law conflicts with a valid exercise of a congressional power. The federal law overrides any contrary state law pursuant to the Supremacy Clause, U.S. Const., art. VI, sec. 2. A federal statute or an agency regulation can preempt state authority. Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979).[1]

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[1] Another case that shows the preemption power of a federal law or agency regulation over alleged State authority is Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981). Pursuant to the Boundary Waters Canoe Area Wilderness Act of 1978, the Department of Interior prohibited the use of motorized crafts within the federal reservation (Boundary Waters Canoe Wilderness Area). The State of Minnesota argued against the prohibition of motorized crafts, by arguing the regulation affected state-owned waters. Acknowledging that the State of Minnesota owns the beds of all the lakes and rivers within the federal reservation (BWCWA), the court held, pursuant to the Supremacy Clause (U.S. Constitution), that the federal regulations, based on congressional intent, applied to the state-owned waters within the federal reservation.

The WDNR has hinted that State of Wisconsin v. Baker, 698 F.2d 1323 (1983) supports the State's claim of competing jurisdiction. The WDNR will likely argue that language found at page. 1335 of the Baker opinion supports the WDNR's claim against the Sokaogon Band:

> [W]e agree with Judge Doyle that the 1854 treaty did not convey to the Band (Lac Courte Oreilles Band of Lake Superior Chippewa) sovereignty over navigable waters within its reservation and that exclusive sovereignty over them is in the State. 524 F.Supp. at 733-35. Baker at 1335.

Unlike the Lac Courte Oreilles Band in Baker, the Sokaogon Band's right to obtain "TAS" status, and to set water quality standards on its reservation waters arises from specific federal law, not from a treaty. The 1987 CWA Amendments, including sec. 518 are more recent than the 1983 Baker decision.

Furthermore, a 1987 United States Supreme Court decision, Utah Division of State Lands v. United States, et al., 482 U.S. 193 (1987), again enunciates the principle that the Federal Government maintains control of navigable waters overlying state-owned lakebeds. Utah Division was a dispute between the federal and state government over oil and gas leases on state-owned lakebeds. The Court ultimately held for the State of Utah, using the "equal footing doctrine" as the basis for the State's right to title of the bed. However, the Court distinguished the Federal Government's rights to the waters over the state-owned beds:

> **[M]oreover, even if the land under navigable waters passes to the State, the federal government may still control, develop, and use the waters for its own purposes.** Arizona v. California, 373 U.S.

> 546, 597-98 (1963). Congress for example, may intend to create a reservoir, but also intend to let the State obtain title to the land underneath the reservoir upon entry into statehood. Such an intent is not unusual. In Montana v. United States, 450 U.S. 544 (1981), we found that Congress intended to permit the State to take title to the bed of a navigable river even though the river was in the midst of an Indian Reservation, and in United States v. Holt State Bank, supra, we held that Congress intended the State to hold title to the bed of a navigable lake wholly within the boundaries of an Indian Reservation. Utah Division at 202. (emphasis added)

Therefore, Baker's claim that "exclusive sovereignty over them [navigable waters] is in the State" overstated the State's power in relation to conflicting federal power. The Federal Government has recognized that Tribes may be treated as States, and indeed, as explained above, that Tribes would be given preference in setting water quality standards on the Tribes' reservations. Tribes qualify for treatment as states for purposes of grants for pollution control programs, grants for the construction of treatment facilities, establishment of water quality standards and tribal implementation plans, implementation of permit systems, and participation in the clean lakes program. See C.W.A., 33 U.S.C. sec. 1377(e) (1994). Congressional intent and recent caselaw supports preemption of the State of Wisconsin's alleged claims of competing jurisdiction. Therefore the Sokaogon Chippewa Community should respectfully request that the EPA Region V grant the Tribe's CWA section 303 Treatment as A State for program authorization.

ATTACHMENT 3

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
101 South Webster Street
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December 7, 1994 M-2802

Mr. Valdas V. Adamkus,
Administrator, Region IV
United States Environmental
Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Via FAX: 12-5-94

Via U.S. Mail: 12-6-94

SUBJECT: Continuation of State Comments Regarding the Mole Lake Band's Request for Authority under Section 303 of the Clean Water Act

Dear Mr. Adamkus:

Thank you for the opportunity to expand our comments on the Mole Lake Band's request for jurisdiction over navigable waters for the purpose of establishing water quality standards.

The State of Wisconsin enjoys sovereignty over all navigable waters located within state boundaries based on the public trust doctrine and the underlying equal footing doctrine. The public trust doctrine provides that the State, in its sovereign capacity, bears the responsibility of insuring that all navigable waters are maintained and protected for public use. The public's right to the use of all navigable waters, and the state's duty to protect those waters, vested at the time of Wisconsin's admission to the Union in 1848.

The equal footing doctrine is based on English common law principles which dictate that ownership of submerged lands is of the utmost importance to the sovereign's ability to control the use of navigable waters. Moreover, according to English common law, all submerged lands beneath navigable waters were presumed to be owned by the sovereign. Shively v. Bowlby, 152 U.S. 2, 11-12 (1894). Therefore, when the thirteen original colonies gained their independence from Great Britain, they succeeded to the English crown's title to the beds and banks of navigable waters. Pursuant to the continuing adherence to this doctrine, the Northwest Ordinance of 1787 declared that when new states were created from the lands within the Northwest Territory (which included Wisconsin), these states were to enjoy the same status as the original thirteen colonies upon admission to the Union. The thirteen original states ceded the Northwest Territory to the federal government on several conditions. Specifically, the federal government was (1) to hold lands underlying navigable waters only in trust for the future States, (2) to admit all new states to the Union with the same rights of sovereignty as the original states, and (3) to allow the navigable waters of these new states to be "common highways and forever free."

Title to submerged lands vested automatically in the state upon admission to the Union without further action from Congress. Shively, 152 U.S. at 15. Based on the "equal footing" and "public trust" doctrines, the Wisconsin Supreme Court has held that:

> The United States never had title, in the Northwest Territory... to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there

> continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Illinois Steel Co. v. Bilot, 109 Wis. 418, 426 (1901).

Thus, when Wisconsin achieved statehood in 1848, ownership of all submerged lands under navigable waters vested in the State. Wisconsin subsequently embraced and preserved the "forever free" concept for navigable waters through passage of the Wisconsin Enabling Act, sec. 3, 9 Stats. 56, and under the State Constitution. Const., art. IX, sec. 1. Numerous cases throughout the state's history reaffirm the public's right to the use of all navigable waters within the boundaries of the state. See generally Diana Shooting Club v. Husting, 156 Wis. 261 (1914); Muench v. Public Service Commission, 261 Wis. 492 (1952).

The establishment of the Mole Lake Reservation in 1939 with the purchase of 1,680 acres by the federal government could not create tribal ownership of submerged lakebeds within or adjacent to the reservation. These lands (i.e. the lakebeds) were already owned by the State of Wisconsin. The United States Supreme Court has stated that the presumption should always be against the transfer of ownership of submerged lands.

In Montana v. United States, 67 L.Ed 2d 493 (1981), the United States Supreme Court discussed the effect of the creation of an Indian reservation on state ownership of submerged lands. Id. at 501. The Court concluded that since the control over submerged lands beneath navigable waters is so strongly identified with the sovereign power of government, "it will not be held that the United States has conveyed such land except because of some international duty or public exigency." Id. at 502. The Court further noted that courts should "begin with a strong presumption against conveyance by the United States and must not infer such a conveyance .. unless the intention was definitely declared or otherwise made plain." Id.

Thus, according to Montana, the presumption is strong against a conveyance of submerged lands to a tribe upon the creation of a reservation. Such a conveyance can only be shown if (1) the intent to transfer title to submerged lands is specifically expressed in the language of the treaty or (2) if exigent circumstances existed at the time of the signing of the treaty which would suggest that the conveyance was implicit in the creation of the reservation. Here the reservation was not created by the treaty, but by an executive order issued pursuant to Section 7 of the Indian Reorganization Act of 1934, 25 U.S.C. 467. The state is aware of no metes and bounds description of the reservation which would include navigable lakebeds. Rather, the reservation was created by the purchase of upland acreage. In any case there is no treaty record of an intent to abrogate the state's rights to navigable waters. In Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983), the Seventh Circuit Court of Appeals applied this standard to another Wisconsin Chippewa tribe's claim to jurisdiction over navigable waters. The court interpreted the relevant treaty language, and ruled that establishing a reservation "for the use of" the Chippewa tribe did not explicitly transfer jurisdiction over navigable waters within the reservation to the tribe. The Court also rejected the Tribe's contention that the circumstances at the signing of the treaty were sufficiently exigent to imply that the federal government intended to transfer sovereignty to the Tribe.

Finally, any claim of authority over streams and streambeds must also be examined in light of the Public Trust Doctrine. While Wisconsin law recognizes that streambeds are owned by the adjacent riparian, this right is subject to the pre-existing rights of the State of Wisconsin under the Public Trust Doctrine. The State of Wisconsin is charged with the duty of administering and protecting all navigable waters for the good of the public and insuring that all navigable waters remain "forever free" for the people to use. Wis. Const., art. IX., sec. 1. Private ownership of the land beneath navigable waters is subject to the state's sovereignty over those waters which was obtained upon statehood and its powers to preserve them as "forever free" and open for public use.

The Mole Lake Band, in spite of its quasi-sovereign status has only very limited authority to regulate the waters within its reservation boundaries. While the State of Wisconsin is not attempting here to assert jurisdiction over the activities of the Mole Lake Band, it must question the ability of the band to control the activities of others on any public waterways that are held to be within its reservation. To put it simply, EPA may have the authority to delegate state status, but the Mole Lake Band does not have jurisdiction to fully implement that authority.

Sincerely,

/s/
George E. Meyer
Secretary

v:\9501\lc9adamk.mal

cc: Governor Tommy Thompson
Attorney General James Doyle
Arlyn Ackley, Chairman, Sokaogon Chippewa Community
Erhard Huettl, Chairman, Forest County Board

33 U.S.C.S.

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards. (1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall

promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations. (1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he

publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) **Review; revised standards; publication.** (1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) **Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal

discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process. (1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The

Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards. For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria. (1) Adoption by States. (A) Initial criteria and standards. Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt. (A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and

pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

§ 1377. Indian tribes

(a) Policy. Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

(b) Assessment of sewage treatment needs; report. The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter, and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

(c) Reservation of funds. The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one- half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92-203 [43 USCS §§ 1601 et seq.].

(d) Cooperative agreements. In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States. The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if—

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

(f) Grants for nonpoint source programs. The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) Alaska Native organizations. No provision of this chapter shall be construed to—

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

(h) Definitions. For purposes of this section, the term—

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

CODE OF FEDERAL REGULATIONS
TITLE 40--PROTECTION OF ENVIRONMENT
CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D--WATER PROGRAMS
PART 131--WATER QUALITY STANDARDS
SUBPART A--GENERAL PROVISIONS

s 131.8 Requirements for Indian Tribes to administer a water quality standards program.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in s 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C.

2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

(c) Procedure for processing an Indian Tribe's application.

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to s 131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(2) Within 30 days after receipt of the Indian Tribe's application, the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and

(ii) Be provided to all appropriate governmental entities.

(3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of s 131.8(a)(3).

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the Water Quality Standards program.

[56 FR 64895, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY

Source: 57 FR 28087, 28088, June 24, 1992, unless otherwise noted.

PART 131--WATER QUALITY STANDARDS

Authority: 33 U.S.C. 1251 et seq.

Source: 48 FR 51405, Nov. 8, 1983; 57 FR 60910, Dec. 22, 1992, unless otherwise noted.

56 FR 64876 Thursday, December 12, 1991

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations

AGENCY: Environmental Protection
Agency

ACTION: Final rule.

... *64877

C. Response to Public Comments

* * *

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1. Treatment of Tribes as States

Comments on the Authority Requirements

a. The Scope of Inherent Tribal Authority

Comment: The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can demonstrate authority to regulate water quality within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce its water quality standards against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions.

By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters asserted that such authority over environmental matters was recognized in *Montana v. United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

Response: EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States*, which previously had held that:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate * * * the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements * * *. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443-444 (Stevens, J., writing for the Court); id. at 449-450 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health or welfare." Id. at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana*.

As further discussed below, EPA agrees with certain commenters that pending further judicial or *64878 Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. See 53 FR 37396, 37399

(September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would be per se unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation.

In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. The extent of such tribal authority depends on the effect of that activity on the tribe. As discussed above, in the absence of a contrary statutory policy, a tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565-66. However, in *Brendale* several justices argued that for a tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 1492 U.S. at 431 (White, J.). In addition, in a more recent case involving tribal criminal jurisdiction, a majority of the Court indicated in dicta that a tribe may exercise civil authority "where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." Duro v. Reina, 110 S.Ct. 2053, 2061 (1990). See also *Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent tribal authority whether activities "implicate a significant tribal interest"); id. at 462 (Blackmun, J.) (test for inherent tribal authority whether exercise of authority "fundamental to the political and economic security of the tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options to assure that the impacts upon tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than de minimis, although to date the Court has not agreed, in a case on point, on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on tribes or create the administratively undesirable result of checkerboarding reservations.

Whether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 476-77 and notes 6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)-(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,

[and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" section 101(b). By extension, *64879 the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. S1018 (daily ed. Jan 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes * * * the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." Id.

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference. Washington Dept. of Ecology v. EPA, 752 F. 2d 1465, 1469 (9th Cir. 1985); see generally Chevron, USA v. NRDC, 467 U.S. 837, 843-45 (1984).

The Agency also believes that the effects on tribal health and welfare necessary to support Tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that states retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by federal law. Id. at 587-89.

Further, water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government. The special status of governmental actions to protect public health and safety is well established.[3] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. See e.g. *Brendale*, see, e.g., *Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a tribe makes in applying for treatment as a State. Thus, a tribal submission meeting the requirements of s 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

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[3] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. See Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 491 n. 20 (1987); Id. at 512, (Rehnquist, C.J., dissenting).

The Agency recognizes that jurisdictional disputes between tribes and states can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

b. The Effect of Section 518 on Tribal Authority over Non-Indian Activities

Comment: EPA has received letters from three members of Congress, Senator Simpson, Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. S753-54 (daily ed. January 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184-85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources." Id. (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary.

By contrast, Senators McCain, Burdick, and Inouye expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some *64880 commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be
no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V) [i.e., sections 518(e) and 518(h)(1) of the CWA]. 492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, inter alia, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes. *Response*: EPA has fully considered the Congressional

comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent statements by Members of Congress. Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (DC Cir. 1989), cert. denied, 111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

Mr. Inouye: * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian tribes to exercise the same water quality regulatory jurisdiction with respect to water that traverses, borders, or is otherwise located within their reservations [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of Section 518(e) correct

Mr. Burdick: Yes. The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water.

133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr. Burdick, a member of the Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction."

However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he--or the Congress as a whole--intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "[p]rivate lands and water rights owners within boundaries of Indian reservations are not to be additionally affected by this act." 133 Cong. Rec. S753 (daily ed. January 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over fee lands.

The legislative history in the House is also unclear as to whether Congress intended to expand tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. See *Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law.

EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of sections 101(g) and 518(a).

* * *

*64881

d. Treatment as a State for Off-Reservation Waters Within Inherent Tribal Authority

Comment: Several comments were received regarding the geographic scope of programs authorized under section 518(e)(2). The provision authorizes EPA to treat a Tribe as a State for water resources which are :

held by an Indian Tribe, held in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

(emphasis added)

EPA has consistently read the phrase "or otherwise within * * *" as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation.

* * *

Response: Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. ... As discussed above, EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation *64882 if the Tribe can demonstrate the requisite authority over such water resources.

* * *

*64885

Comment: EPA should clarify what happens if a Tribe is denied treatment as a State (s 131.8 (c)(5)). …

Response: Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur.

LANDS PROCLAIMED TO BE AN INDIAN RESERVATION FOR USE OF SOKAOGON CHIPPEWA COMMUNITY

Wisconsin

June 30, 1939

By virtue of authority contained in Section 7 of the Act of June 18, 1934 (48 Stat. 984), the lands described below, acquired by purchase under the provisions of Section 5 of that Act, are hereby proclaimed to be an Indian reservation for the use and benefit of the Sokaogon Chippewa Community:

T. 35 N., R. 12 E., 4th P. M.

E1/2SW1/4, SE1/4 Section 20.

SW1/4, NE1/4SE1/4, W1/2SE1/4 Section 21.

Government lots 1 and 2, Section 22.

SW1/4NW1/4, Section 26.

Government lot 2, Section 27, except that part bounded and described as follows: Commencing at a point on the east and west quarter line of Section 27, T. 35 N., R. 12 E., which is 76 rods and 16 links west of the quarter post between Sections 26 and 27 in said township, and running thence west along said quarter line 479 feet to the meander line on the lake; and thence north 45° east, or along the meander line of said lake 841.5 feet to a point in the meander line; thence south 32° east 475 feet; thence south 62° west 379.5 feet to place of beginning.

Government lot 3, Section 27. subject to a right of way of State Trunk Highway No. 55 and excepting the following described parcel: Commencing at the NW1/4SE1/4 of said section; thence south 67.5 feet to western edge of State Aid Highway 55; thence southwesterly along said highway 148 feet; thence north 32°30' west to north line of said NW1/4SE1/4; thence east to place of beginning.

Government lots 4 and 5, Section 27, excepting the right of way of a public road over and across said lots and a certain portion of Lot 5 described as follows: Commencing at the southwest corner of said Government lot 5; thence east on the south line of said Government lot 5 a distance of 7 rods; thence north parallel with the west line of said section to the high water mark of Swamp Creek or the outlet of Rice Lake; thence westerly along the high water mark of Swamp Creek or the outlet of Rice Lake; to the section line between Sections 27 and 28; thence north along said section line to the place of beginning.

Government lots 6 and 7, Section 27.

NE1/4SE1/4 Section 27, excepting therefrom a tract of land described as follows: Commencing at the northwest corner of the NE1/4SE1/4 of said Section 27; thence running south 67.5 feet to the western edge of State Highway No. 55; thence in a northeasterly direction along the edge of said highway 172.4 feet to the east and west quarter line of said Section 27; thence westerly along said quarter line 152 feet to the place of beginning.

Government lots 1, 2 and the east 70 rods of Government lot 3, Section 28.

Government lots 4 and 5, Section 28, except that portion of lot 5 described as follows: Commencing on the southeast corner of Section 28; thence running west 18 rods; thence north 18 rods; thence east 18 rods; thence south 18 rods to place of beginning.

N1/2NE1/4, SW1/4NE1/4, W1/2SE1/4 and SW1/4 Section 28.

Government lot 2, Section 29.

All of the said lands being within Forest County, Wisconsin, containing a total of 1,437.60 acres, more or less.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

Sokaogon Chippewa Community, Wis.; Proclaiming Certain Lands as Part of Sokaogon Chippewa Community (Reservation)

April 8, 1982.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary–Indian Affairs by 209 DM 8.1.

On April 8, 1982, pursuant to authority contained in section 7 of the Act of June 18, 1934 (48 Stat. 986; 25 U.S.C. 467), the following described land, located in Forest County, Wisconsin, was added to and made a part of the Sokaogon Chippewa Community (Reservation).

4th Principal Meridian

Parcel A
T. 35 N., R. 12 E.,
Sec. 21. SE1/4SE1/4;
Sec. 22. Government Lots 3 and 4 and W1/2SW1/4.

Parcel B
T. 35 N., R. 12 E.,
Sec. 27, Part of Lot 5 described as

Commending at the Southwest corner of Lot 5, thence east 7 rods, thence north parallel with section line to the high water mark on Swamp Creek, to the section line between Secs. 27 and 28. thence south on section line between Secs. 27 and 28 to the place of beginning.

Parcel C
T. 35 N., R. 12 E.,
Sec. 26, described as: that portion of the NW1/4NW1/4, lying west of State Trunk Highway #55, further described as beginning

at the corner to Secs. 22, 23, 26 and 27, thence east along section line a distance of 1,226 ft., more or less to the center line of State Trunk Highway 55. thence south 29°30' west along the centerline of State Truck #55 a distance of 1,510 ft., more or less, to the south line of NW1/4NW1/4 of Sec. 26. thence west on the south line of NW1/4NW1/4 Sec. 26 a distance of 477 ft. more or less to the section line between Secs. 26 and 27. thence north on said section line a distance of 1,320 ft., more or less to section corner and point of beginning containing 25.80 acres.

Sec. 27, Government Lot 1.

Parcel D

T. 35 N., R. 8 E.,

Sec. 27, Part of Lot 8 described as:

Beginning at a point on the section line between Sections 27 and 28, T. 35 N., Range 12 E., which is designated as the northwest corner of the SW1/4SW1/4. Sec. 27, T. 35 N., R. 12 E., thence run south along the said section line 24 rods, more or less, thence east 43 rods to the west line of the Military Road, now State Trunk Highway 55, thence in a northeasterly direction along the west line of said State Trunk Highway 55, 41 rods, more or less, to a point where said State Trunk Highway 55 intersects the north line of SE1/4SW1/4 of said Section 27, in said township and range, thence west along the north line of said SW1/4SW1/4 80 rods, more or less, to the point of beginning.

Parcel E

T. 35 N., R. 12 E.,

Sec. 27, part of SW1/4SW1/4 described as:

Commencing at a point 33 ft. north of the corner of Secs. 27, 28, 33, and 34 on the section line between Secs. 27 and 28, thence running north on the section line between Secs. 27 and 28 for a distance of 743 ft., this shall be place of beginning. thence north 100 ft., thence east 80 ft. thence south 100 ft., thence west 80 ft. to place of beginning.

Parcel F

T. 35 N., R. 12 E.,

Sec. 27, Lots 2 and 3(c) of Government Lot 8 described as: Beginning at a point 33 ft. north of the corner of Secs. 27, 28, 33 and 34, on the section line between 27 and 28, thence running north on the section line between 27 and 28 a distance of 843 ft., thence east on 4 degrees, 82 ft., this shall be the place of beginning, thence east on 4 degrees, 164 ft., thence south 100 ft., thence west 164 ft., thence north to the place of beginning.

Parcel G

T. 35 N., R. 12 E.,

Sec. 27, SW1/4SW1/4 Lots 4, 5 and 6 of Government Lot 8 described as follows: Beginning at a point 33 ft. north of the corner of Secs. 27, 28, 33 and 34 on the section line between Secs. 27 and 28,thence running north on section line between Secs. 27 and 28 a distance of 843 ft., thence east on 4° 246 ft. to place of beginning, hence east on 4° 246 ft., thence south 100 ft., thence west 246 ft., thence north to place of beginning.

The above described parcels containing 246.23 acres more or less. Subject to all valid easements, rights-of-way, reservations of oil, gas and minerals, and other rights of record.

Kenneth Smith.
Assistant Secretary–Indian Affairs.
[FR Doc. 82-10958 Filed 4-21-82; 8:45 am]
BILLING CODE 4310-02-M

FEB 10 1995

BY TELEFAX AND FIRST CLASS MAIL C-29A

Arlyn Ackley, Sr.
Tribal Chairman
Sokaogon Chippewa Community
Mole Lake Band
Rt. 1, Box 625
Crandon, Wisconsin 54520-9635

Re: Status of Treatment as State Application

Dear Mr. Ackley:

This letter responds to your inquiries to Valdas Adamkus dated January 27 and February 7 concerning the status of your Tribe's application for "treatment as a State" ("TAS") for the water quality standards program under Section 303 of the Clean Water Act. As you know, the State of Wisconsin raised a competing claim of jurisdiction regarding waters within the Mole Lake reservation. The Office of Regional Counsel ("ORC") is working closely with the Office of General Counsel ("OGC") at the United States Environmental Protection Agency ("EPA") Headquarters to resolve this claim so that EPA may make a decision on your application as soon as possible.

The Mole Lake Band submitted its Section 303 TAS application to EPA on August 13, 1994. The application did not provide enough information regarding the specific lands and water resources over which the Tribe would exercise its authority. After the Tribe provided that information to EPA, EPA provided the State of Wisconsin 30 days, beginning on October 5, 1994, to submit comments on the Tribe's assertion of authority, as required by 40 C.F.R. § 131.8(a) (3). On November 4, 1994, the Wisconsin Department of Natural Resources ("WDNR") indicated that it believed that there may be a significant jurisdictional claim on behalf of the State that may inhibit application of TAS status to Indian Tribes in Wisconsin. WDNR requested an additional 90 days to complete its comments. On November 18, 1994, EPA notified the Tribe and WDNR that EPA would accept comments from both parties until December 5, 1994. Both WDNR and the Tribe sent EPA additional comments on December 5.

EPA considers some issues raised by WDNR (i.e., ownership of water beds within the reservation and the effect of that ownership on the right to regulate water quality) to be nationally significant. In fact, at least one other State in another EPA Region has raised similar issues. EPA policy requires ORC to refer nationally significant Indian law issues to requires ORC to refer nationally significant Indian law issues to OGC for resolution. Pursuant to that policy, ORC has forwarded to OGC all documents relevant to the competing claim.

Another issue of national significance which ORC has referred to OGC for resolution is the extent of the appropriate consultation with the Department of Interior. Until December 14, 1994, EPA regulations required EPA to consult with the Department of the Interior on any competing claim raised by a State to a Tribe's assertion of authority. On that day, EPA issued regulations which remove that requirement. *See* 59 Fed. Reg. 64,344. As explained in the preamble to the December 14 rule, EPA still may, at its discretion, consult as it sees fit with the Department of Interior or any other Federal agency.

ORC and OGC are working closely together and consulting with other affected Regional offices to resolve all issues affecting the Tribe's application as expeditiously as possible. We are aware of the importance of Section 303 TAS to your Tribe and appreciate your understanding of the complexity of the situation. EPA shall keep the Tribe informed of our progress in this matter. If you have any additional questions, please feel free to telephone me at 312/886-6675 or Marc Radell of my staff at 312/886-7848.

Sincerely,

Gail C. Ginsberg
Regional Counsel

cc: Howard Corcoran, OGC

bcc: ORA (w/control slip)
O'Riordan, R-19J
C. Johnson-Schultz, W-15J
D. Pfeifer, WQ-16J
K. Ambutas, ME-19J
S. Dodge, IEL
J. Havard, OGC, 2378
C. Klebenow, C-29A

U.S. Department of Justice

Environment and Natural Resources Division

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Washington, D.C. 20026

Telephone (202) 514-2748
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Mr. Gino Agnello
Clerk
United States Court of Appeals for the 7th Circuit
219 South Dearborn St.
Chicago, IL 60604

June 1, 2001

Re: Wisconsin v. Environmental Protection Agency 7th Cir. No. 99-2618. **Oral Argument held 11/6/2000**

Dear Mr. Agnello,

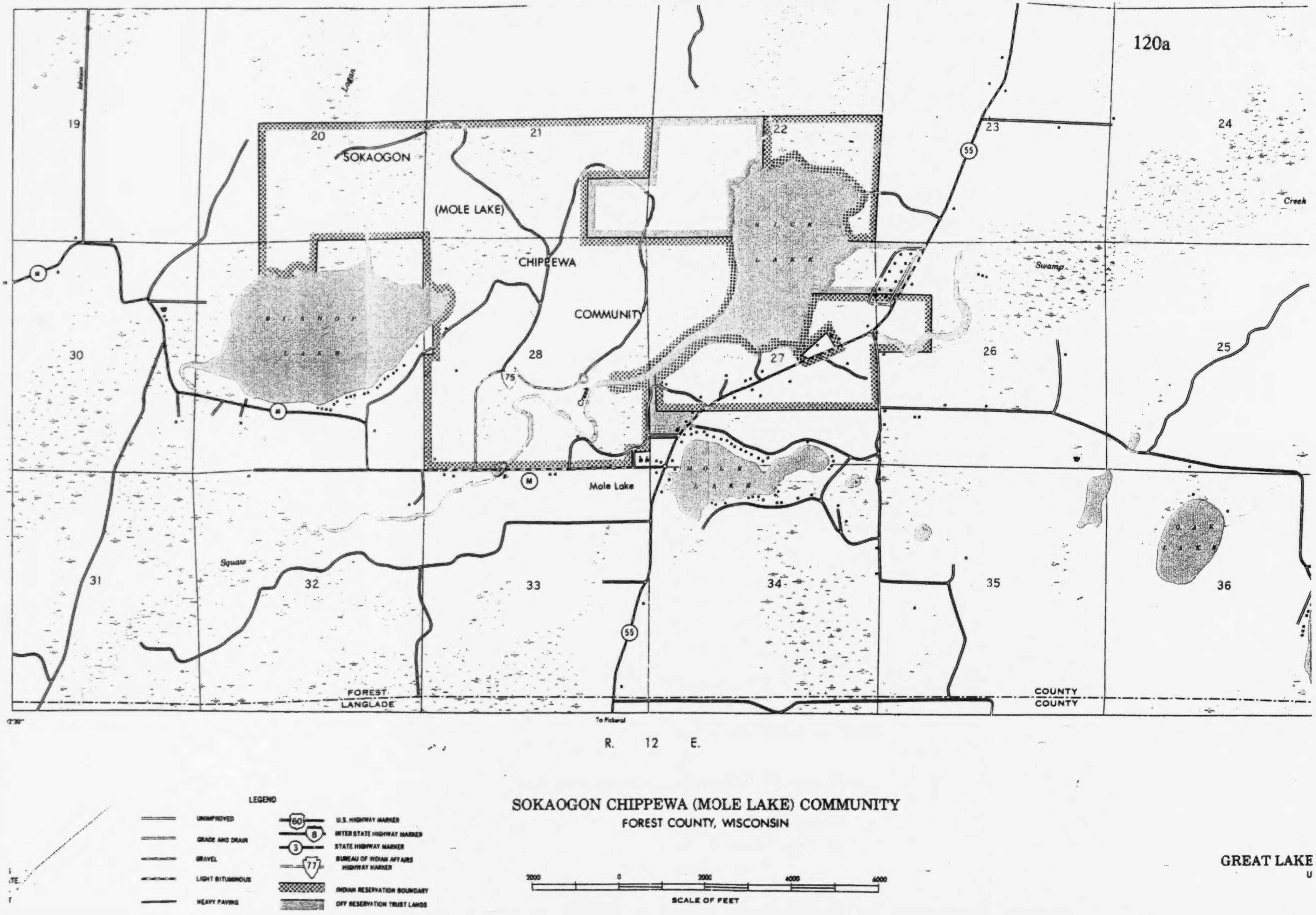
An original and four copies of this letter are submitted pursuant to Federal of Appellate Procedure 28(j). This letter is intended to bring to the Court's attention the latest decision by the Supreme Court applying the so-called Montana exceptions to the general proposition that the inherent sovereign powers of Indian tribes do not extend to nonmember activities on non-Indian fee land within a reservation. See Montana v. United States, 450 U.S. 544, 565 (1981). On May 29, 2001, the United States Supreme Court decided Atkinson Trading Company v. Shirley, 2001 WL 567730 (a copy is attached). This case concerns a hotel operated within the Navajo Nation Reservation but located on non-Indian fee land. The Navajo Nation imposed a hotel occupancy tax on the hotel guests. The hotel owner challenged the tax, alleging that the Navajo Nation lacked the authority to tax guests staying on non-Indian fee lands. The Tenth Circuit Court of Appeals upheld the tax, finding that it fell within the so-called first Montana exception because a consensual relationship exists in that the nonmember guests could refrain from lodging within the Navajo Reservation and therefore remain free from the tax. The Supreme Court reversed.

The Court found that the first Montana exception did not apply because a consensual relationship must stem from commercial dealings, contracts, leases or other arrangements and a hotel guest's actual or potential reliance on tribal emergency services (like tribal police, fire or medical departments) fails to create the requisite connection. (Opinion at 4). The Court also found no basis to apply the second Montana exception, which permits tribal regulation of non-Indian fee land when conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566. The Court concluded that operation of the hotel had no such effect on the Navajo Nation. (Opinion at 5).

Although the facts of Atkinson Trading differ from the instant case, we bring it to this Court's attention because it is the Supreme Court's most recent discussion of the Montana test, which the Court applied "straight up"(see opinion at 4) in Atkinson Trading. The brief of the United States discusses how the second Montana exception applies to the instant case at pp. 31-44. The brief explains that Montana is arguably irrelevant in this case because there are no non-Indian lands within the Reservation owned in fee by nonmembers (only submerged lands arguably owned by Wisconsin). Br. 31. Nonetheless, the brief shows that if the second Montana exception applies here it is satisfied because, under the facts of this case, impairment of water quality by nonmember activities may have serious and substantial impacts on the Mole Lake Band and water quality management is critical to tribal self-government. See Br. 39. As indicated by the attached service list a copy of this letter has been provided to opposing counsel.

Respectfully submitted,

/s/
Andrew C. Mergen
Attorney, Appellate Section
Environment & Natural
Resources Div.
U.S. Department of Justice
(202) 514-2813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3 STATE HIGHWAY MARKER
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SCALE OF FEET

SOKAOGON CHIPPEWA (MOLE LAKE) COMMUNITY
FOREST COUNTY, WISCONSIN

GREAT LAKE

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Supreme Court, U.S.
FILED

MAY 3 2002

THE CLERK

No. 01-1247

In The

Supreme Court of the United States

◆

October Term, 2001

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

◆

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

◆

BRIEF OF RESPONDENT SOKAOGON CHIPPEWA COMMUNITY IN OPPOSITION TO WISCONSIN'S PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

IF CERTIORARI WERE GRANTED

1. Does the Equal Footing Doctrine prevent the EPA from treating a Tribe as a state for the purpose of participating in a Clean Water Act water quality standards program on a reservation with no fee land?

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1837 Treaty, 7 Stat. 536 (1837) 3
1842 Treaty, 7 Stat. 591 (1842) 3
1854 Treaty, 10 Stat. 1109 (1854) 3

FEDERAL STATUTES

33 U.S.C. § 1251 6
33 U.S.C. § 1311 6
33 U.S.C. § 1313, § 303 .... 9, 10, 20
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33 U.S.C. § 1377, § 518 .... passim
33 U.S.C. §§ 1251-1387 6

OVERVIEW

In 1987, Congress amended the Clean Water Act authorizing the Environmental Protection Agency (hereinafter "EPA") to treat qualified tribes as a "state" in order to participate in Clean Water Act programs. Congress limited "state" status to tribes with inherent authority manifested by an organized governmental structure and the administrative capability to manage reservation water resources.

In drafting a rule to implement this amendment, the EPA confronted the jurisdictional complexity of checkerboarded reservations with fee lands within their borders. Taking a conservative approach, the EPA decided to evaluate a tribe's "inherent authority" over reservation water resources on a case-by-case basis to avoid unreasonable impacts to non-Indians living on fee lands within the reservation. The EPA never had to deal with this problem here because there are no fee lands owned by non-Indians within the 1850-acre Sokaogon reservation.

The EPA previously granted "state" status to the Sokaogon Chippewa Community to participate in federally funded water quality and wild rice studies on its reservation waters. Based upon this work, the EPA again granted the Sokaogon "state" status to develop and request EPA approval of reservation water quality standards (hereinafter "WQS") to protect the Tribe's wild rice and water resources.

Wisconsin contends that the Equal Footing Doctrine granted Wisconsin exclusive authority over State navigable waters, which prevents the EPA from allowing the Tribe to propose reservation WQS to the EPA for approval under the Clean Water Act (hereinafter "CWA").

Wisconsin's Petition should be denied for several reasons. First, the EPA's decision to treat the Sokaogon as a "state" was a reasonable exercise of federal authority under the CWA which does not depend on lakebed ownership. There are also no fee lands within the Sokaogon reservation and no non-Indians impacted by tribal authority.

Second, the EPA's decision was amply supported by the administrative record, and was consistent with both the policies of the CWA and the federal government's trust responsibility to the Sokaogon people. The EPA's decision is therefore entitled to deference.

Third, there is no split among the circuits as this is the third Court of Appeals decision to uphold the EPA's grant of treatment as a state status (hereinafter "TAS") to a tribe for the purpose of approving WQS. See City of Albuquerque v. Browner, 97 F. 3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). Given EPA's sound application of Congressional authority to give qualified tribes a limited role under the CWA, this Court denied review of the two previous cases. For the following reasons, it should follow suit here.

SUPPLEMENTAL FACTS

A. SOKAOGON HISTORY

Centuries before white settlement, ancestors of the Lake Superior Chippewa migrated west to the Great Lakes region. The migration ended when they found "the food that grows on water" – wild rice.[1] The Sokaogon Chippewa Community is a band of the Lake Superior Chippewa that settled along the shores of Rice Lake, Swamp Creek and surrounding lakes in Northeastern Wisconsin. When white settlers, miners and loggers made demands for their lands, the Tribe agreed to cede their ancestral territory only in exchange for the federal government's promise that the Sokaogon people would have the right to hunt, fish and gather wild rice and other resources "upon the lands, the rivers and the lakes" in the ceded territory and that they would receive a permanent reservation.[2]

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[1] Lowe, Patty, Indian Nations of Wisconsin, 54-56, Wisconsin Historical Society Press (2001).

While the 1854 Treaty granted reservations to most of the Chippewa Bands, the Sokaogon were forced to live as squatters around Rice Lake for 85 years before the federal government formally recognized their independent status and purchased the land surrounding Rice Lake and Swamp Creek in 1939 as a permanent reservation. The federal government strategically purchased the land around Rice Lake to give the

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[2] 1837 Treaty, 7 Stat. 536 (1837); 1842 Treaty, 7 Stat. 591 (1842); 1854 Treaty, 10 Stat. 1109 (1854).
See also Lac Courte Oreilles v. Voigt, 700 F.2d 341 (7th Cir. 1983);
Vennum, Thomas, Wild Rice and the Ojibway People, 257, 289 , Minn. Society Press (1988).

Sokaogon exclusive control and access to the lake and its resources, which are so essential to their survival.[3]

The Sokaogon lived around Rice Lake because the wild rice provided a reliable food source that sustained them as long as they protected the water it depended on. The wild rice also wove the cultural fabric that bound the Sokaogon people together. It was the foundation of their legends, songs, ceremonies, religion and connection with nature.

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[3] BIA anthropologist, Charles Wisdom, studied the Sokaogon in 1936 and articulated the federal government's rationale for purchasing the Sokaogon reservation.

> The Mole Lake area, after the contemplated land purchases are all made, will completely surround Rice Lake, about 10 miles south of Crandon. It will include the lake proper, the marshy area around the lake which contains wild berries and cranberries and an area further back which is high and dry in which will be suitable for gardening and pasture purposes. Thus, the Mole Lake Band will live on land completely surrounding the lake and will, as a result, control the lake and its resources…
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> …
>
> I think it is highly important that the natural resources on Indian lands, especially the plant and animal life, be reserved strictly for exploitation by the Indian group. I am told by the land buyers that this can be done by the federal government once the title to land passes into its hands, and that the government can similarly restrict the exploitation of lakes once it owns the land surrounding the lakes. Without such protection, the Indians cannot be expected to maintain much of their traditional form of life and increase their standard of living at the same time. Competition with local whites would be too much otherwise…Rice is by far the most important cash commodity for the majority of the Chippewa.

Wisdom, Charles, Report on The Great Lakes Chippewa, 8, 15-16 (1936). (CR: 60)

See also State of Wisconsin v. Lowe, 109 Wis. 2d 633, 637-639, 327 N.W.2d 166 (Ct. App. 1982) (describing Indian Reorganization Act land purchase rationale and Wisdom report.)

After white settlement and the creation of a money economy, the wild rice also presented a means for tribal members to attain economic security. Vennum, at 58-80, 199-254.

Rice Lake and the adjacent creeks, streams and wetlands continue to be extremely important to the Sokaogon for the provision of fresh water, food, medicines and raw materials. Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001). In the administrative proceedings below, the EPA noted that Rice Lake is "prime habitat for the largest single stand of inland emergent wild rice in the world." The EPA also recognized that "wild rice serves as the foundation for the Band's diet, as it has for centuries" and that "it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e. degradation." (Pet'r App. p. 51a)

The Sokaogon are governed by a constitution and bylaws, which grant its tribal council authority to make and enforce such rules as are necessary to preserve the natural resources of the Tribe subject to the limitations imposed by the United States Constitution or laws of the United States. (Administrative Record (AR): A p. 4-20)

The Sokaogon Reservation contains no non-Indian fee land within its borders. (Pet'r App. p. 34a) The Tribe, therefore, possesses complete regulatory control over its territory, which surrounds Rice Lake and over tribal members residing on the Reservation. (Pet'r App. p. 120a)

Rice Lake, portions of Swamp Creek, miles of streams and hundreds of acres of wetlands are all waters within the borders of the Reservation and are waters of the United States, which are regulated by the EPA under the CWA. (Pet'r App. p. 51a); Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001).

B. CLEAN WATER ACT FACTUAL BACKGROUND

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, popularly known as the Clean Water Act, became law on October 18, 1972. In the wake of inadequate state control of water pollution, its goal was, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This goal was to be achieved by a comprehensive regulatory framework that created a role for the states to work toward the goal of eliminating all pollution in waters of the United States by 1985. 33 U.S.C. § 1251(a).

The CWA required each state to adopt federally acceptable WQS to protect sensitive habitat and designated uses of the state's water resources. Enforcement was achieved by prohibiting discharges that would violate state WQS. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. By controlling discharges, the CWA essentially regulates "on land" activities that affect water quality. Although EPA has authorized Wisconsin to regulate discharges by administering a National Pollution Discharge Elimination System (hereinafter "NPDES") program, EPA still retains the power to veto a state discharge permit. A downstream state can request the EPA to cancel an upstream state's discharge permit if its WQS will be violated by the discharge. After the objection is made, the EPA is authorized to make the final permit decision following a public hearing. 33 U.S.C. § 1341.

In the early 1980's it became obvious to federal authorities that the CWA regulatory framework badly needed input from tribal governments, which at that time controlled a geographic area larger than the states of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine combined. (AR: I p. 1) At that time, no federal environmental regulatory programs included a role for tribal governments pertaining to water quality or a mechanism to determine tribal needs.

The process of bringing tribal governments into the CWA regulatory framework started slowly. In 1984, EPA implemented President Reagan's federal Indian policy, which gave tribes a key role in managing the reservation environment.[4] The EPA then developed special rules regarding environmental regulation of air, groundwater, landfills and solid waste in Indian country. See Marx, Jane et al., Tribal Jurisdiction Over Water Quantity and Quality, 43 SDLR 315, 353-55 (1998).

In 1987, Congress formalized these policies by amending the CWA to permit the EPA to treat qualified tribes as states under the CWA for various purposes including the adoption of WQS for waters within the borders of a tribe's reservation. 33 U.S.C. § 1377. This amendment authorized the EPA to treat a tribe as a state if it met three requirements:

> The Administrator [EPA] is authorized to treat an Indian tribe as a State for the purposes of subchapter II … to the degree necessary to

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[4]

> In keeping with the principle of Indian self government, the Agency will view tribal governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as the Environmental Protection Agency's deliberations and activities have traditionally involved the interests and or participation of state governments, the Environmental Protection Agency will look directly to tribal governments to play this lead role for matters affecting reservation environments.

(AR: I p.9)

> carry out the objectives of this section, but only if –
>
> (1) the ***Indian tribe has a governing body*** carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to ***the management and protection of water resources*** which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or ***otherwise within the borders of an Indian reservation***; and
>
> (3) the ***Indian tribe is reasonably expected to be capable***, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e) (emphasis added)

To implement the legislation, the EPA promulgated 40 C.F.R. § 131.8(a). This rule was identical in content to the three requirements set forth by Congress except that the EPA added the requirement that the Indian tribe be federally recognized, which included the definition of "Indian Tribe" at 33 U.S.C. § 1377(h)(2).

With the passage of Sec. 518(e), Congress expressly delegated to the EPA the authority to confer TAS status on Tribes, which, in EPA's judgment, met the requisite qualifications, for a variety of related environmental programs under the CWA.

After receiving TAS recognition from the EPA to participate in two CWA programs for water quality monitoring and to study the ecosystem of Rice Lake, the Sokaogon applied for TAS status to develop WQS for reservation waters pursuant to Sec. 303 (33 U.S.C. § 1313).

A tribe with federally approved WQS has the power to object to the issuance of an upstream discharge permit which it contends would violate its WQS. Since the EPA ultimately decides whether the discharge will violate downstream WQS, the tribe has no veto authority over an upstream permit decision. Granting a tribe "state" status to propose WQS to the EPA therefore does not in any way conflict with state sovereignty. See 33 U.S.C. § 1341; Wisconsin v. EPA, 266 F. 3d 741, 749-50 (7th Cir. 2001).

In passing Sec. 518(e), Congress anticipated that there might be conflicts between state and tribal WQS and set up a mediation procedure so that tribes and states could negotiate their differences under the ultimate authority of the EPA. Wisconsin has never availed itself of this procedure to resolve its objection to the Sokaogon's EPA approved WQS.

It is important to note that this case only raises the propriety of the EPA's grant of TAS to the Sokaogon. It does not address the reservation WQS that were ultimately approved by the EPA. That case has not yet been litigated.[5] See 33 U.S.C. § 1377(e); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). (Pet'r App. 12a)

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[5] The scope of the WQS are subject to an additional challenge by the State in the Eastern District of Wisconsin. State of Wisconsin v. U.S. EPA, et al., case number 96-CV-597. That case is being held in abeyance until the question of whether the EPA properly granted TAS to the Sokaogon is decided.

Wisconsin objected to this TAS request to enable the Tribe to adopt WQS pursuant to Sec. 303, (33 U.S.C. § 1313), on the grounds that the Equal Footing Doctrine granted State ownership of the lakebeds and with it the right to regulate water on Rice Lake and Swamp Creek. (Pet'r App. p. 13a) Wisconsin does not argue that its WQS would apply to Sokaogon reservation waters.[6] Wisconsin merely challenged the ability of the Sokaogon, "to control the activities of others on any public waterways that are held to be within its reservation." (Pet'r App. p. 73a)

After considering Wisconsin's objections, the EPA determined that the Tribe had adequate civil "authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters." (Pet'r App. p. 45a) Based on the Tribe's previous success in participating in CWA programs, the EPA recognized that the Tribe was highly capable to carry out its CWA responsibilities. (Pet'r App. p. 53a) The EPA concluded that Sokaogon WQS were necessary to preserve the Tribe's water resources and wild rice. (Pet'r App. p. 51a) Over Wisconsin's objection, the EPA approved the Sokaogon's third TAS application and its WQS in September 1995. (Pet'r App. p. 37a)

REASONS FOR DENYINGTHE PETITION

I. THERE ARE NO QUESTIONS OF COMPETING SOVEREIGNTY THAT ARE EITHER NOVEL, EXTRAORDINARY OR NEED TO BE RESOLVED BY THE SUPREME COURT.

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[6] It is doubtful that Wisconsin WQS would apply to reservation waters. See 40 C.F.R. § 123.1(h). Consequently, there is a need for Sec. 518(e) and cooperation between the EPA and the Tribe to determine what WQS are needed to protect reservation resources.

A. Since The CWA Is A Federal Regulatory Program, There Is No Clash Of Tribal And State Authority Over Regulation Of The Nation's Navigable Waters.

Wisconsin argues that ownership of lakebeds is an "incident of sovereignty," which is partially divested by tribal participation in CWA programs under the control of the EPA. (Wisconsin's Pet. p. 20-22) There is no clash between tribal and state authority, however, since both sovereigns are subject to federal authority under the "watchful eye" of the EPA. Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001). When EPA qualified the Tribe to participate in CWA programs, it exercised federal authority.

This Court has consistently held that federal law controls water pollution in navigable waters under the authority of the Commerce Clause. Twenty-four years before Wisconsin became a state, this Court held in Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1 (1824), that the Commerce Clause vested Congress with plenary power over both navigable waters and commerce with Indian tribes. See United States Constitution, Art. I, § 8, Cl. 3. The Court stated:

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce' with foreign nations, or among the several States, or with the Indian tribes.

Ogden, 22 U.S. at 197.

When Wisconsin became a member of the Union, it subordinated its control over navigable waters to the superior authority of the federal government. See Martin v. Lessee of Waddell, 41 U.S. 367, 16 Pet. 367, 410 (1842). This Court has never interpreted the Equal Footing Doctrine to grant a state greater authority than the federal government in the regulation of navigable waters. In First Iowa Hydro-Electric Co-operative v. Federal Power Com., 328 U.S. 152, 171-76, 180-81 (1946), this Court recognized that although Iowa had jurisdiction over property rights to beds and banks of streams pursuant to the Equal Footing Doctrine, it was:

> ... the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States.

First Iowa, 308 U.S. 152 at 171-76. See also Federal Power Commission v. Oregon, 349 U.S. 435, 443 (1955) (upholding superior federal authority over non-navigable waters located on federal lands based on the Commerce and Property Clause to the United States Constitution); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987).

This case is distinguishable from Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997), which Wisconsin erroneously cites for the proposition that Wisconsin "owns" all the navigable waters of the state. Coeur d'Alene raised the issue of whether Idaho owned the lakebeds under navigable waters within the reservation and gave it the power to build structures in the lakebeds. Federal regulation of water quality, however, does not depend on lakebed ownership.

One hundred sixty-eight years after Ogden was decided, this Court acknowledged plenary federal regulatory power over states to control interstate water pollution. In Arkansas v. Oklahoma, 503 U.S. 91 (1992) the Court stated:

> [W]e have long recognized that ***interstate water pollution is controlled by federal law***...Recognizing that the system of federally approved state standards as applied in the interstate context constitutes federal law is wholly consistent with this principle. Second, treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of intrastate water pollution regulation.

Arkansas, 503 U.S. 91 at 112 . (emphasis added)

No states rights have been usurped by EPA's decision in this case. In participating as a state under the CWA, the Tribe is simply communicating its needs to the EPA to achieve the goals of the CWA and follow the objectives behind Sec. 518(e). An unbroken line of Supreme Court precedent stands against Wisconsin's claim for relief.

B. The Federal Government Has Plenary Power Over Indian Tribes.

EPA's approval of the Tribe's TAS status is consistent with this Court's recognition of the federal government's plenary power and special trust responsibly over Indian tribes. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

This Court has repeatedly recognized that the United States owes a special fiduciary duty of trust to Indian tribes and to Indian people. United States v. Kagama, 118 U.S. 375 (1886). See also Seminole Nation v. United States, 316 U.S. 286, 296 (1942); United States v. Mitchell, 463 U.S. 206, 225 (1983); and, Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981) (discussing and applying the EPA's trust responsibility to tribes for protection of reservation resources).

The Court of Appeals acknowledged the critical importance of Sokaogon's reservation water resources to the survival of its people and the need for federal protection.

> [T]he Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines and raw materials. In particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band.

Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001).

State laws are generally not applicable to Indians on Indian reservations except where Congress has expressly allowed state laws to apply. See e.g. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 175-79 (1973). Congress did just the opposite in passing Sec. 518. State water law also does not control the use of water by tribal members on Indian lands with respect to fulfilling any of the purposes of the reservation. See generally Cohen, Felix S. Handbook of Federal Indian Law, Mitchie Company, 578-98. (1982).

C. There Is No Split Among The Circuits With Respect To Treatment Of Tribes As States Pursuant To The CWA.

This is the third case which has upheld the EPA's recognition of a tribe as a state for the purpose of recommending WQS to the EPA under the CWA. See City of Albuquerque v. Browner, 97 F. 3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert.*

denied, 525 U.S. 921 (1998). The EPA's authority to apply Sec. 518(e) of the CWA to tribes has been consistently applied by the Tenth, Ninth and now the Seventh Circuit Courts of Appeals. The federal circuits are unanimous in recognizing that the CWA is a federal regulatory scheme which provides the EPA with authority to determine whether a tribe can qualify for state treatment under the CWA. The EPA's decision to grant TAS here was fact specific to a reservation with no fee land. This case raises no question of national significance.

II. THE EPA'S GRANT OF TAS TO THE SOKAOGON IS CONSISTENT WITH SUPREME COURT PRECEDENT, IN HARMONY WITH THE GOALS OF THE CWA, AND IS ENTITLED TO DEFERENCE.

Wisconsin claims the EPA's decision permits "dual sovereignty" over navigable waters. See Kennedy v. Becker, 241 U.S. 556 (1916).[7] The CWA, however, establishes a partnership among qualified tribes, states and the federal government under a comprehensive federal regulatory scheme. Wisconsin implies that it has exclusive power to regulate reservation waters, but ignores the fact that its own regulation of state water quality is under the authority of the EPA.

A. The EPA's Decision Was Consistent With Precedent And Is Entitled To Deference.

By approving the Tribe's TAS, the EPA followed the intent of Congress to give qualified tribes an opportunity to protect reservation water resources by participating in CWA programs. This Court has consistently rejected Equal Footing claims, which impact tribal water resources. See Winters v. United States, 207 U.S. 564, 576 (1908) (acknowledging the need of Indian tribes to have adequate water necessary for all "arts of civilization," including sufficient water to grow food, and to make an Indian reservation livable.)

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[7] Kennedy actually dealt with a state's power to regulate off-reservation hunting and fishing and not the regulation of water quality. This case, like many of the "Equal Footing cases" cited by Wisconsin was decided decades before passage of the CWA and assertion of federal authority over water pollution.

In Arizona v. California, 373 U.S. 546 (1963), this Court rebuffed the use of the Equal Footing Doctrine to defeat federal power to provide sufficient water to Indian tribes to fulfill the purposes of the reservation:

> Arizona's contention that the federal government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), and *Shively v. Bowlby*, 152 U.S. 1 (1894)...But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property...

Id. at 597-98. See also United States v. District Court of County of Eagle, 401 U.S. 520, 522-23 (1971) (federal reserved water rights doctrine takes effect even if the reservation was created after statehood.); Cappaert v. United States, 426 U.S. 128, 145 (1976); United States v. New

Mexico, 438 U.S. 696, 702 (1978). This Court has recently held that issues relating to both water quality and quantity pertain directly to the CWA's regulatory scheme. See PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 719 (1994).

Federal statutes pertaining to tribal rights are liberally interpreted in favor of retained tribal self-government and property rights as against competing claims under state law. "[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." See Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (citation omitted); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 484 (1979); Bryan v. Itasca County, 426 U.S. 373, 392 (1976). This precedent is in complete harmony with the EPA's exercise of discretionary authority to grant TAS to the Tribe.

In light of the EPA's expertise in environmental affairs, its rational exercise of trust responsibility, the support in the administrative record for the TAS decision and the need to construe the statute liberally in favor of the Sokaogon, the EPA's decision to grant TAS to the Tribe was "a reasonable exercise of the agency's substantial statutory discretion" and is entitled to deference. [8] United States v. Mead Corp., 533 U.S. 218 (2001); Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984); Arkansas v. Oklahoma, 503 U.S. 91, 107 (1992).

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[8] After a "careful review" of the administrative record, the District Court found that the record supported the EPA's conclusion that the Tribe was "federally recognized," had a "governing body carrying out 'substantial governmental duties and powers;" is "reasonably ... capable of carrying out the functions of an effective water quality standards program" under the CWA, and that the WQS program pertained to the "management and protection of water resources within the borders" of the Sokaogon reservation. (Pet'r App. p. 24(a) – 26(a))

B. The Seventh Circuit Decision Is Not In Conflict With Montana And Its Progeny.

The Supreme Court cases cited by Wisconsin are irrelevant to the issues raised in this case. All of these cases relate to a tribe's assertion of authority over non-Indians without the benefit of a federal treaty or statute.

In Montana v. United States, 519 U.S. 1099 (1981), the Court decided that the Crow Tribe did not have sufficient inherent authority to regulate non-Indian hunting and fishing on fee land within the reservation boundaries. Unlike Montana and its progeny, this case does not deal with the exercise of purely inherent tribal power against non-Indian activities on fee land within an Indian reservation. The focus here is the propriety of the EPA's decision, pursuant to a federal statute, to recognize qualified tribes as "states" so that they can study their reservation water resources and propose the most effective means to protect them.

There are three reasons why this case is distinguished from Montana. First, the CWA authority conferred here only gives the Tribe the power to participate with the federal government and the states under the CWA for purposes of protecting reservation water quality. Second, the EPA's grant of TAS status does not give the Tribe the power to exclude non-Indians from using the navigable waters of Wisconsin or prohibit the state from keeping those waters "forever free." Third, since there are no fee lands within the reservation, non-Indians are not affected by the Tribe's TAS status or EPA's approval of reservation WQS. Again, it is up to the EPA and not the tribal government to enforce the reservation WQS.

The other Supreme Court cases cited by Wisconsin also analyzed the propriety of inherent tribal power superceding areas of traditional state jurisdiction – a situation not at issue here. In Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1988), the Court assessed a tribe's authority to impose land use controls on fee land within its reservation boundaries. Since land use regulation is almost exclusively a function of state and local government, Brendale evaluated the need for tribal authority to override a traditional area of state sovereignty, which directly impacted non-Indians living on fee land within the reservation. This situation is not implicated here because there is no fee land on the Sokaogon reservation and the Tribe's TAS status stems from an exercise of federal authority.

In Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), this Court prohibited the exercise of inherent tribal power to tax non-Indians on fee land within the reservation boundaries. In contrast, no tribal jurisdiction is being exercised against non-Indians in this case. The EPA simply exercised federal authority to allow qualified tribes, such as the Sokaogon, to participate in specific CWA programs. The same analysis applies to the other cases cited by Wisconsin. In Nevada v. Hicks, 533 U.S. 353 (2001) and Strate v. A-1 Contractors, 520 U.S. 438 (1997) this Court evaluated tribal adjudicative jurisdiction over state law enforcement officers and private citizens, which is not implicated here.

In Idaho v. United States, 533 U.S. 262 (2001) this Court upheld the exercise of tribal authority over lakebeds to prevent the state of Idaho from building docks, piers and navigational aids in a lake within an Indian reservation. The tribe's authority there hinged on the Court's finding that Congress transferred ownership of the lakebeds adjacent to its reservation. Here, neither the EPA nor the Sokaogon are interfering with Wisconsin's power to build piers or navigational aids in lakebeds or streambeds. CWA authority does not depend on the ownership of lakebeds. If it did, the federal government would have no power to regulate interstate water pollution.

C. The Sokaogon Made An Adequate Showing Of A Threat To Tribal Health And Welfare To Participate In CWA Programs Even If Montana Did Apply.

Tribes are "distinct, independent political communities." They retain sovereign authority over their territory and members if it has not otherwise been extinguished by statute or treaty. They have the "right ... to make their own laws and be ruled by them." Nevada v. Hicks, 533 U.S. 353, 361 (2001). Thus, tribes have inherent sovereign authority over their own members to control water use and protect water quality on their reservations. United States v. Wheeler, 435 U.S. 313, 323 (1978); Worcester v. Georgia, 31 U.S. 515, 559, 6 Pet. 515 (1832).

The Sokaogon Tribal Council exercised its inherent authority by requesting funding from the EPA to study its water resources. Subsequently, the Tribal Council adopted Outstanding Natural Resource Waters (ONRW) WQS and requested the EPA to grant TAS status in order to participate under Sec. 303 of the CWA and ultimately to approve its WQS. (Pet'r App. p. 50a-55a)

The Tribe's studies of the Rice Lake ecosystem and reservation water quality provided the EPA with important information about the fragile nature of the reservation resources and the need to preserve the waters in a pristine condition. (Pet'r App. p. 51a-53a) The EPA's approval of ONRW WQS for reservation waters is completely consistent with the goals of the CWA to restore the "chemical, physical and biological integrity of the Nation's waters" and to fulfill the federal government's special trust responsibility toward Native American tribes. Just as the CWA protects Wisconsin from pollution from an upstream state, this federal regulatory scheme protects tribes and other states from another upstream state's pollution.[9]

Wisconsin argues that tribal interests will be protected by state regulation. Wisconsin's current WQS, however, allow water quality degradation and do not fully protect vital reservation resources. Wisconsin's WQS are not acceptable to the Sokaogon, particularly in light of plans for a zinc and copper mine which may be built two miles upstream from the Sokaogon reservation.[10] The EPA agreed that the health of the Tribe's wild rice depended upon enhanced protection of reservation water resources. (Pet'r App. p. 51a)

Regulation of water quality raises a serious and substantial interest to human beings. As a result, both the EPA and the Seventh Circuit recognized that participation in water pollution control programs is a "core governmental function." Wisconsin v. EPA, 266 F.3d 741, 748 (7th Cir. 2001). Due to the mobile nature of pollutants, potential harm to tribal communities cannot be minimized. Pollution of downstream tribal waters and destruction of tribal water uses clearly threatens "the political integrity, economic security and the health and welfare of tribal members." See Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). Thus, even if the Montana rule did apply to the facts of this case, it would justify the Tribal Council's request for TAS status and approval of its proposed WQS.[11]

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[9] Congress anticipated that differing tribal and state WQS might cause friction by outlining a process of mediation. See 33 U.S.C. § 1377(e). Wisconsin has never shown any interest in expressing its concerns through this process.

[10] Wisconsin is correct that it is not constructing its own mine upstream from the reservation.

D. The EPA's Administrative Rule And Its Application To This Case Was Reasonable.

Wisconsin argues that the EPA's decision to treat the Sokaogon as a state extends tribal power over those who have not given their consent to be governed. Wisconsin warns about the impact to non-tribal members from "unwarranted intrusions on their personal liberty" and the importance "to know where tribal jurisdiction begins and ends." (Wisconsin's Pet. p. 14) Wisconsin's argument is flawed, however, since it is the EPA and not the tribal government that will enforce the Tribe's WQS. The EPA has simply recognized that the Sokaogon have a right to participate in establishing the level of federal protection to be given the waters of the reservation under the CWA's federal regulatory framework.

Due to the jurisdictional complexity of checkboarded reservations, the EPA adopted its rule to assess the whether it was appropriate to confer "state" status to a tribe. In its rule the EPA interpreted Sec. 518(e) of the CWA as not constituting a direct delegation of authority to all tribes, but to enable tribes qualified by the EPA to propose WQS necessary to protect reservation waters. The EPA simply required a showing that the reservation waters were central to the tribe's long-term survival, that the tribe had authority to control the activities of tribal members on tribal land affecting water quality and that the tribal government had the ability to carry out its CWA responsibilities.

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[11] Federal courts have supported the application of the Montana "second exception" to reservation water pollution control even before Sec. 518(e) was enacted. In Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, et al. v. Namen, 665 F.2d 951 (9th Cir. 1982), the Court of Appeals concluded that the tribes had regulatory authority over non-Indian riparians living along Flathead Lake because of the high potential for harm caused by water pollution.

In a "flood gates" argument, Wisconsin asserts that the EPA's "lax" rule (which in 10 years has only resulted in a handful of tribes nationally obtaining approval for reservation WQS) will enable all 11 of Wisconsin's tribes to automatically assert tribal jurisdiction over non-Indians. (Petition p. 13) Wisconsin points out that 85 percent of the Wisconsin Oneida reservation is now occupied by non-Indians. (Wisconsin's Pet. p. 15 fn. 8). While the Oneida Reservation is mostly owned by non-members of the tribe, the Sokaogon Reservation is radically different, as there is no fee land within its borders.

The EPA's grant of TAS status merely gave the Tribe a voice under the CWA to establish standards for the protection of Sokaogon reservation waters. To the extent that the Sokaogon exercised inherent tribal civil regulatory authority by adopting WQS and requesting EPA approval, it only regulated the activities of tribal members on tribal lands affecting reservation water quality which it had the right to do.

The Seventh Circuit concluded that the specific facts of this case and the lack of fee lands on the Reservation were key factors in upholding EPA's grant of TAS.

> [T]he reservation here is unusual in that there are no parcels of fee land within the reservation owned by non-members of the tribe. We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe's 'inherent authority' to affect off-reservation activities so far as to go beyond the standards of the statute or the

> regulations. If it ever arises, that will be another case, for another day.

Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001).

Given the unique facts of this case, the EPA's exercise of federal authority under the CWA to recognize the Sokaogon as a state was reasonable and raises no significant issues which need to be resolved by this Court.

CONCLUSION

For all the reasons set forth above, Wisconsin's Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 3rd of May, 2002.

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Supreme Court, U.S.
FILED
MAY - 2 2002
OFFICE OF THE CLERK

(3)

No. 01-1247

In The

Supreme Court of the United States

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STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTINE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALASKA, FLORIDA, KANSAS, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

The States of Idaho, *et al.*, through their respective Attorneys General pursuant to S. Ct. R. 37.4 respectfully submit a brief amicus curiae in support of petitioner.

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INTERESTS OF AMICI CURIAE STATES

Environmental quality is a core sovereign concern for all States. Implicit in this concern is preserving authority to regulate conduct that may or does affect the environment. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air"). The States' preeminent place in environmental regulation has not been ignored by Congress, which carefully structured much of its environmental legislation to provide States with the opportunity to implement their laws not only independently of that legislation but also in lieu of federal regulation. *E.g.*, Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251-1387; Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-26; Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k; Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q. This sovereign interest in controlling environmental quality assumes even greater weight where navigable streams or lakes are involved because of the States' ownership and trust interest deriving from operation of the Equal Footing Doctrine. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997) (relief quieting title in Indian tribe "[n]ot only would . . . block all attempts by [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in law and infused with a public trust the State itself is bound to respect").

To be sure, the States' interests are not beyond congressional control. The Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, encompasses federal regulation of waters "navigable in fact or which could reasonably be so made." *Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001). This Court has held further that "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated powers, such as treaty making." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999). The Clean Water Act makes special provision in section 518, 33 U.S.C. § 1377, for Indian tribes to be accorded "treatment as a State" ("TAS") for specified reservation "water resources," and the court of appeals reasoned below that "[b]ecause the state does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government's allowing tribes to do so." Pet. 9a-10a.

That statement by the Seventh Circuit lies at the heart of the questions presented and the amici States' concerns. The issue here is not whether *Congress* can regulate water quality standards on Rice Lake. It is instead whether, given the unchallenged construction by the Environmental Protection Agency ("EPA") that section 518 does not contain a delegation of federal power, respondent

Sokaogon Chippewa Community ("Band") can so regulate as a matter of retained inherent authority under principles described in *Montana v. United States,* 450 U.S. 544 (1981). *See* 56 Fed. Reg. 64,876, 64,880 (1991) (Pet. 104a-105a).[1] In upholding the agency action, the court of appeals credited the EPA's application of the second *Montana* "exception" to the general principle that tribes lack inherent authority over nonmembers or their property. The court's determination, like the underlying agency decision, betrayed a fundamental misunderstanding of *Montana* principles, which limit the exception's applicability to situations where state law impermissibly interferes with tribal self-governance and thereby is preempted.

The Seventh Circuit's acceptance of the analytical approach used by the EPA to grant the Band's request for

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[1] Petitioner describes the nature of the 1991 TAS regulations in detail. Pet. 5-8. It nonetheless warrants mention that the SDWA and CAA also contain TAS provisions. 42 U.S.C. §§ 300h-1(e), 300j-11(b)(1) (SDWA); 42 U.S.C. § 7601(d)(1)(A) (CAA); *see also Backcountry Against Dumps v. EPA,* 100 F.3d 147 (D.C. Cir. 1996) (rejecting EPA's construction of RCRA as authorizing TAS status for tribes). The EPA has interpreted the TAS provision in the SDWA identically with that in the CWA – i.e., as conditioning TAS status on the existence of inherent authority over the regulated activity (59 Fed. Reg. 64,339 (1994)) – while it has construed the CAA provision as a delegation of federal authority (63 Fed. Reg. 7254 (1998)). *See Arizona Pub. Serv. Co. v. EPA,* 211 F.3d 1280 (D.C. Cir. 2000) (deferring to EPA's construction of the CAA's TAS provision as delegation), *cert. denied,* 532 U.S. 970 (2001). Neither petitioner nor the amici States dispute in this matter Congress' power to regulate water quality in commercially navigable waters or to permit tribal regulation of water quality standards in lieu of EPA control where inherent tribal authority exists over the affected water resource.

TAS status has significance far beyond the water-quality-standards application here. As of March 1998 – four years ago – the EPA had granted TAS or program approval status for more than 130 tribes across the country with respect to CWA-related activities. *Treatment of Tribes in the Same Manner as States/Program Approval Matrix* (Mar. 1998) <http://www.epa.gov/indian/matrix.htm> (last visited Apr. 6, 2002). Because the EPA is proceeding aggressively to implement section 518, its erroneous understanding of substantive Indian law principles will compromise a significant and growing number of TAS determinations. The time has come for this Court to intervene, correct the agency's mistake, and avoid misfocused litigation over TAS decision-making and potential interference with fundamental state sovereign interests. *See Montana v. USEPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

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STATEMENT

I. The Secretary of the Interior is authorized under section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, to acquire in trust land "for the purpose of providing land for Indians" and under section 7, *id.* § 467, to "proclaim new Indian reservations on [such] lands." In 1939 the Assistant Secretary exercised this authority to declare approximately 1,438 acres in Forest County, Wisconsin, a reservation for the Band. Pet. 19a, 108a. The reservation, commonly known as the Mole Lake Reservation (*e.g.*, Pet. 50a, 58a, 71a), has been increased to 1,850 acres through acquisition of additional trust lands. Pet. 50a, 110a. These acquisitions did not include the bed and banks of Rice Lake, a water body almost entirely surrounded by the acquired lands. *See* Pet. 120a. The Lake is navigable, with approximately one-third of its water supplied by Swamp Creek whose headwaters arise off reservation but which also flows downstream from the reservation after leaving the Lake. Pet. 51a, 120a.

In August 1994, the Band sought TAS status from the EPA for the purpose of promulgating water quality standards under section 303 of the CWA, 33 U.S.C. § 1313, with respect to all water resources within the reservation. Pet. 57a; *see* 40 C.F.R. § 131.8 (2001) (Pet. 89a). The application was granted in September 1995. Pet. 37a. The responsible EPA regional administrator, in requesting concurrence from higher agency officials with his recommendation that the application be granted, described Rice Lake as "prime habitat for the largest single stand of inland emergent wild rice in the world." Pet. 51a. He further observed that "[w]ild rice serves as the foundation for the Band's diet, as it has for centuries" and is "critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed." *Id.; see Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-58 (7th Cir. 1983) (discussing Chippewas' treaty history and reservation of usufructuary rights on ceded lands). While acknowledging that "the relationship between wild rice and water quality is only beginning to be understood," the regional administrator stated that "it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes." *Id.* He reasoned that "[t]he Band's water quality standards provide a mechanism for protecting this important resource." *Id.* There was nevertheless no finding either that the Lake's water quality was deteriorating or that the wild rice stand was being diminished through on-reservation "environmental changes."

In concurring with the regional director's recommendation, the EPA's Office of General Counsel noted the Band's obligation under section 518 to "demonstrate [its] authority and capability" to regulate affected waters in the reservation. Pet. 45a. That requirement was deemed satisfied, since "the Band clearly has regulatory authority over all members of the Band" and "[s]ince all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters." *Id.* The Office of General Counsel additionally expressed its " 'doubt that, in the case of a reservation such as this one, where *all* the lands (except perhaps those within the navigable waters themselves) are Tribal trust lands, a court would even find the need to examine the scope of Tribal authority over nonmembers' activities (since there are no non-Indian lands owned in fee by non-members, only lands arguably owned by the State).' " Pet. 45a-46a. Were such analysis undertaken, however, "the Band could easily establish jurisdiction by showing that the effect of the activities of such non-members on the health and welfare of the Band would be 'serious and substantial.' " Pet. 46a. "In particular," the concurrence stated, "Rice Lake, the largest water body, is a prime source of wild rice which serves as a significant diet and economic resource for the Band." Pet. 46a-47a.

The Office of General Counsel, like regional officials, dismissed the significance of Wisconsin's claimed title to the bed and banks of Rice Lake. "[E]ven if the State did retain title to the beds of the Mole Lake Reservation, EPA could . . . properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA." Pet. 44a. Wisconsin's title to the Lake's submerged land, in short, was deemed irrelevant to resolving the scope of the Band's inherent authority. *See also* Pet. 58a (analysis by Office of Regional Counsel stating that "[t]he statutory scheme of the Clean Water Act does not link ownership of lake beds with regulation of water quality" and that "the Act contemplates geographic location of the water resources [on a reservation] as the determinative factor").

II. Petitioner unsuccessfully sought judicial review of the EPA's action granting the Band's application for TAS status to administer its water quality standards program. Pet. 1a, 15a. The district court quoted extensively from the regional administrator's and the Office of General Counsel's recommendation memoranda and, despite indicating some doubt over the correctness of the agency's construction of section 518(e)(2) in its 1991 rulemaking, deferred to that interpretation because "both the statute and legislative history are ambiguous" and "[t]he EPA's construction is reasonable and permissible." Pet. 32a. The court of appeals' substantive reasoning differed significantly from the district court's and was divided into three components, the last two of which are germane to the questions presented.

The Seventh Circuit first rejected the contention that the Band lacked inherent authority over the Rice Lake "water resource" because of petitioner's "ownership of the underlying lake beds" pursuant to the Equal Footing Doctrine. Pet. 7a. Like the EPA, the court deemed it unnecessary to resolve the ownership issue on the merits, since it found "pertinent . . . a number of legal principles all of which support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation." Pet. 9a. Even as to such waters, it reasoned, Congress has regulatory power where navigability exists for Interstate Commerce Clause purposes. *Id.* The court additionally relied on Congress' authority under the Indian Commerce Clause and suggested, but did not hold, that "in the absence of tribal TAS status, the EPA and not [petitioner] might well be the proper authority to administer the Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides." *Id.* It concluded this aspect of the opinion with the statement that because petitioner did "not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing the tribes to do so." Pet. 9a-10a.

The Seventh Circuit next rejected what it characterized as petitioner's argument that "the Band did not make the required showing of authority over those activities potentially affected by its imposition of water quality standards." Pet. 10a. The "activities" referred to were petitioner's purportedly "planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake" and off reservation. Pet. 5a.[2] The "extraterritorial effect" postulated by the court derived from section 518(e)'s direction to the EPA to establish a "mechanism" for resolving "any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" and the attendant possibility that more stringent tribal standards could affect off-reservation, upstream water use. Pet. 12a-13a; *see City of Albuquerque*, 97 F.3d at 423-24. That possibility did not negate the Band's claim of inherent power in the Seventh Circuit's view because "this authority is not defeated even if it exerts some regulatory force on off-reservation activities" and because "[w]hether the tribe or the state ultimately 'wins' in the dispute, it is the EPA, not the tribe or the state, that has the ultimate authority to decide whether or not to issue a permit." Pet. 13a.

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[2] As petitioner points out, the court of appeals' statement in this regard was wrong on several counts – i.e., petitioner is not seeking to construct the involved mine, and the proposed facility is not on the Wolf River which is *downstream* from the

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ARGUMENT

WHETHER A TRIBE POSSESSES INHERENT AUTHORITY OVER "WATER RESOURCES" BELONGING TO A STATE RAISES IMPORTANT QUESTIONS OF STATE SOVEREIGNTY AND INDIAN LAW, AND THIS COURT SHOULD REMOVE ANY DOUBT OVER THE APPROPRIATE ANALYSIS FOR RESOLVING THAT QUESTION.

I. The Seventh Circuit's Analysis Failed To Address The Controlling Issue In This Matter: Whether Wisconsin Water Quality Standards Are Preempted From Application To Rice Lake.

Section 518(e)(2) of the CWA is the focus of this controversy. One of several requirements conditioning

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reservation. Pet. 10 n.4. There is also no factual support in the administrative record for the implication that the mine's development would prejudice Rice Lake's water quality.

EPA's authority to treat an Indian tribe as State for section 303 purposes, it demands a showing that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation[.]" 33 U.S.C. § 1377(e)(2). The EPA, as discussed above, construed section 518(e)(2) in the 1991 TAS regulations as not constituting a delegation of federal authority but, instead, as requiring a tribe to establish under Indian law principles that it possesses inherent authority to regulate the involved water resources. *See* 56 Fed. Reg. at 64,880.[3] The agency further construed the provision to authorize TAS status over *any* water resource within a reservation as to which the required showing of inherent power and the other statutory preconditions was made. *Id.* at 64,881-82. This latter construction was premised on reading "the phrase 'or otherwise within . . . ' as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation." *Id.* at 64,881.

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[3] In so determining, the EPA also discussed what it characterized as "the contrary conclusion" adopted by four members of this Court in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,* 492 U.S. 408 (1989) (opinion of White, J.). Justice White stated with respect to the issue there, which involved application of a tribal zoning ordinance to nonmember-owned lands, that "[t]here is no contention . . . that Congress has delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. *Cf.* 18 U.S.C. §§ 1151, 1161 (1982 ed., Supp. V); 33 U.S.C. § 1377(e) and (h)(1) (1982 ed., Supp. V)." *Id.* at 428. The EPA's assumption that the reference to the several statutes was intended to identify examples of delegation of federal power is problematic since, as this Court recently explained, "[s]ection 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Post Co. v. Shirley,* 532 U.S. 645, 653 n.5 (2001). The Court did characterize § 1161 as a delegation of federal authority in *United States v. Mazurie,* 419 U.S. 544, 577 (1975), but it is hazardous to assert that the "*cf.*" reference to section 518(e)(2) and the definition of "Federal reservation" in section 518(h)(2) was

Each construction is critical here. While the importance of the first is plain, the expansive interpretation of section 518(e)(2) as encompassing reservation water resources in addition to those held by or for a tribe or a tribal member leads directly to the problem at hand, since both the EPA and the court of appeals held those resources to include navigable water bodies whose submerged lands are owned by a State under the Equal Footing Doctrine. The Seventh Circuit, like the EPA, assumed that because the Band's proposed water quality standards only regulate persons who "discharge" into Rice Lake, those persons constituted the class against which the scope of its authority must be measured. Pet. 2a-3a, 45a-46a. Given the fact that the only likely dischargers into the Lake are tribal members, the court thus did not direct a *Montana*-based analysis to their conduct,

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intended to signal the "conclusion" that those provisions exemplify a delegation of federal power. In context, the reference is viewed more properly as merely suggesting the possibility that section 518(e)(2) might be *claimed* by a litigant to constitute a delegation – a claim or "contention" that had not been raised concerning the tribal zoning ordinance.

focusing instead on whether *Montana* limits tribal authority to adopt water quality standards which may have an indirect impact on discharges *outside* the reservation and ultimately concluding that this "extraterritorial effect" was "beyond the scope of *Montana*, which concerned only tribal authority over non-member activities on reservation fee lands." Pet. 11a.

The court of appeals' analysis ignored that, as a legal and practical matter, what is being regulated is Rice Lake and that, in so regulating, the Band attempts to displace state regulation with its own. An Indian tribe nevertheless cannot "preempt" state law by exercise of its inherent authority; only federal law can accomplish that end through the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980). By necessary implication, therefore, the TAS determination can stand only if Wisconsin water quality standards are foreclosed from application to Rice Lake by federal common law principles – an issue the Seventh Circuit skirted. This Court should clarify the centrality of the preemption inquiry in section 518 TAS determinations.

II. The Seventh Circuit Ignored This Court's Repeated Holding That, In Determining Whether Inherent Tribal Authority Exists So As To Displace State Regulation, The *Williams* Preemption Standard Must Be Applied.

Petitioner has challenged not only the EPA's application of the second *Montana* exception but also the Band's authority to regulate state-owned waters as a categorical matter. These challenges, while embodied in separate questions presented, raise interrelated issues of state sovereignty and Indian law that are controlled by the three most recent decisions of this Court concerning the scope of inherent tribal authority: *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Atkinson Trading*, and *Nevada v. Hicks*, 533 U.S. 353 (2001).

A. *Strate* was the first case in which this Court reached the merits of a claim that a tribal court lacked civil adjudicatory authority over a nonmember involved in an on-reservation accident with another nonmember. In deciding the issue, the Court characterized *Montana* as "describ[ing] a general rule that, absent congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." 520 U.S. at 446. It then rejected the contention that the second of those exceptions – whether the involved conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (*Montana*, 450 U.S. at 566) – permitted exercise of tribal court jurisdiction because on-reservation careless driving "surely jeopardize[s] the safety of tribal members" (*Strate*, 520 U.S. at 458):

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to regulate rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." . . . Neither regulatory nor adjudicatory authority over the state highway

> accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them."

Id. at 459 (citations omitted). *Strate* thus established that, despite the second exception's reference not only to a tribe's "political integrity" but also to its "economic security[ ] or health or welfare," the "[k]ey" to resolving questions over the exception's breadth lies in the *preemption* standard articulated in *Williams v. Lee,* 358 U.S. 217, 220 (1959). That standard, as explained in *Strate,* asks whether application of state law as the rule of decision in a controversy would impermissibly infringe on tribal self-government rights.

This Court revisited the second exception in *Atkinson Trading,* where a nonmember trading post owner challenged a tribal hotel occupancy tax imposed on its guests. After concluding that *Montana's* core presumption against the existence of inherent tribal authority existed, the Court shifted the burden to tribal officials to show the presence of one or both of the exceptions. As to the second, it rejected the argument that the provision of tribal government services, employment of tribal members, benefiting from reservation-attracted tourism, or the fact that the trading post was surrounded by tribal lands provided an appropriate basis for the exception's applicability. This Court reasoned that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe" (532 U.S. at 657 n.12), the exception would be unavailable and observed that, "[w]hatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity" (*id.* at 659).

Hicks followed the *Strate-Atkinson Trading* pattern of proscribing the nonconsensual reach of inherent tribal authority beyond that necessary to protect tribal self-government or to preserve internal relations. Although the issue there dealt with the assertion of tribal court jurisdiction over state game wardens, this Court reasoned that since inherent tribal adjudicatory power cannot exceed tribal legislative authority and since the tribe's legislative reach under *Montana* standards did not encompass regulating on-reservation service of process in connection with off-reservation criminal offenses, the tribal court lacked jurisdiction. 533 U.S. at 357-58.

One aspect of the ensuing analysis of tribal legislative authority stands out for present purposes: The *Hicks* Court held the *Montana*-derived presumptive absence of tribal jurisdiction unrebutted because tribal regulation of the state officers was not essential to protecting tribal self-government or to controlling internal relations and, in so holding, found it unnecessary to refer to the second exception explicitly. It thus described *Montana* as standing for the broad principle that "[t]ribal assertion of regulatory authority over nonmembers must be connected to th[e] right of the Indians to make their own laws and be governed by them." 533 U.S. at 361. The Court then applied the *Williams* interest-balancing standard to determine whether the game wardens had acted beyond the federally permissible reach of state authority. "State sovereignty," it observed, "does not end at a reservation's border" (*id.*) notwithstanding the absence of "the same degree of regulatory authority within a reservation" (*id.* at 362) as possessed off reservation by a State. Such sovereignty existed in the *Hicks* controversy because the ability to serve process on reservation with respect to off-reservation conduct "is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice' " and because "[t]he State's interest in execution of process is considerable[.]" *Id.* at 364.

B. The Seventh Circuit referred to these cases in its decision but did not address their significance other than to state that the 1991 TAS regulations "track" *Strate* "by noting [inherent] authority is generally proper because 'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.' " Pet. 10a-11a. The court's isolated statement, however, failed to recognize that under the *Williams* preemption standard "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville,* 447 U.S. at 156; *accord Hicks,* 533 U.S. at 362. No such interest balancing occurred below.

Undertaking what the Seventh Circuit should have conducted – i.e., an inquiry into the pertinent federal, state and tribal interests – is revealing. *First,* the most telling manifestation of the federal interest under the CWA is its "State authority," or savings, provision in section 510, 33 U.S.C. § 1370. Pet. 84a. As the Seventh Circuit held twenty-five years ago, "[s]ection 510 preserves in general terms the right of any state to impose limitations and standards more stringent than those adopted under the Act." *United States Steel Corp. v. Train,* 556 F.2d 822, 830 n.5 (7th Cir. 1977). Indeed, the EPA has long deferred to Wisconsin water quality standards and enforcement mechanisms outside Indian country – implicit recognition that the State's standards are no less stringent than those adopted by the EPA under the CWA. *E.g.*, 46 Fed. Reg. 1021 (1981); 52 Fed. Reg. 3700 (1987); 65 Fed. Reg. 50,528 (2000); 66 Fed. Reg. 65,957 (2001). It also warrants noting that, despite their eligibility for TAS status, tribes neither are nor can be deemed a "State" under section 510, a congressional determination indicating that the statute itself does not invest tribal water quality standards with a preemptive effect. 33 U.S.C. §§ 1362(3), 1377(e); *see City of Albuquerque*, 97 F.3d at 423. This conclusion is paralleled by settled principles of statutory construction:

> When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute. . . . ' " This principle applies when Congress "intends to pre-empt the historic powers of the States" or when it legislates in " 'traditionally sensitive areas' " that " 'affec[t] the federal balance. . . . ' " In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor v. Regents, 122 S. Ct. 999, 1006 (2002) (citations omitted). Here, Congress altered through the CWA the " 'usual constitutional balance between the States and the Federal Government' " only to the extent provided under section 510.

Second, the state interest is compelling. This Court reiterated only last Term that "[d]ue to the public importance of navigable waterways, ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.' " *Idaho v. United States,* 533 U.S. 262, 273 (2002). In a prior related decision, the Court rejected the contention that a distinction could be drawn between state officials and the State itself for purposes of relief under *Ex parte Young,* 209 U.S. 123 (1908), given the admittedly "immediate effect on [state] jurisdictional control over important public lands" underlying a navigable lake. *Coeur d'Alene Tribe,* 521 U.S. at 282. In short, "[b]ecause title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 195 (1987). There simply can be no legitimate dispute over the importance to petitioner's sovereignty of the ability to determine and enforce water quality standards on navigable waters within its boundaries – particularly where, as here, those waters are interconnected with streams or other water bodies that admittedly fall underneath its regulatory aegis.

Last, tribal self-government interests are minimal. Not only does the administrative record contain no evidence that Wisconsin water quality standards are inadequate to protect any usufructuary or other rights that tribal members may have with respect to resources in or on Rice Lake, but the second *Montana* exception also "is triggered by *nonmember conduct* that threatens the Indian tribe." *Atkinson Trading,* 532 U.S. at 657 n.12. Nothing precludes the Band, in other words, from regulating its own members, and its failure to engage in such regulation cannot be employed to justify application of the second exception. To the extent the Band may be concerned about off-reservation mining or other impacts on the Lake by nonmembers, it has recourse to state administrative and judicial procedures to avoid prejudice to any claimed "protectible interest." *E.g.*, Wis. Stat. §§ 281.15, 281.31; Wis. Admin. Code §§ 102.01-102.14, 115.01-115.06; *see Brendale*, 492 U.S. at 430-31 (opinion of White, J.). This Court accordingly has never suggested that off-reservation nonmember conduct may serve as a predicate for invoking the second exception with respect to on-reservation regulation.

A *Williams*-based accommodation of federal, state and tribal interests thus cuts against finding the existence of the Band's regulatory authority over Rice Lake water quality where petitioner's ownership of the Lake's bed and banks is assumed. Indeed, the strength of the state interest and the absence of meaningful, countervailing federal or tribal interests support the categorical rule advanced by petitioner. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (state and tribal interests need not be rebalanced in each case where state taxation of tribal members is involved, since "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak"). Regardless of whether it reaches the merits of the preemption issue here, however, the Court should take this opportunity to explain the proper analytical structure for making TAS determinations.[4]

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[4] The amici States recognize that the EPA and the Seventh Circuit assumed, but did not determine formally, petitioner's

Absent such guidance, lower courts will continue to misapply *Montana* standards and, therefore, section 518 of the CWA.

◆

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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May 2002

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ownership of Rice Lake's submerged lands. While this issue thus may be appropriate for resolution in remand proceedings, the amici are constrained to observe that, in light of the reservation's administrative creation almost a century after Wisconsin statehood, pursuant to legislative authority enacted in 1934, and the exclusion of the Lake from the description of the lands acquired for the reservation, no plausible basis exists to negate such ownership. *See, e.g., Idaho*, 533 U.S. at 280 n.9.

Supreme Court, U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

(4)

No. 01-1247

In the Supreme Court of the United States

STATE OF WISCONSIN, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians may administer a water quality standards program for surface waters within its reservation pursuant to Section 1377(e) of the Clean Water Act, 33 U.S.C. 1377(e), notwithstanding Wisconsin's claim that it holds title to the beds of some of those waters under the Equal Footing Doctrine.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 266 F.3d 741. The opinion of the district court (Pet. App. 15a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress has authorized the Environmental Protection Agency (EPA) to treat Indian Tribes in the same manner as States for certain purposes of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and has directed EPA to promulgate regulations "which specify how Indian tribes shall be treated as States" for those purposes. 33 U.S.C. 1377(e). See Pet. App. 86a-87a. Following notice and comment, EPA promulgated regulations that provide a mechanism for Tribes to receive "treatment as a state" (TAS) status. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). The Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians (the Band) applied for and received TAS status under those regulations. *Id.* at 37a-38a. Petitioner, the State of Wisconsin, brought this action in the United States District Court for the Eastern District of Wisconsin challenging EPA's grant of TAS status to the Band as unlawful. The district court rejected petitioner's assertions that EPA's decision is invalid as a matter of law, *id.* at 15a-34a, and the court of appeals affirmed, *id.* at 1a-14a.

1. The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States in which the States have "primary responsibilities and rights" to regulate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Congress has also extended that partnership to Indian Tribes by providing, through Section

1377(e) of the CWA, that Indian Tribes satisfying prescribed criteria are eligible for treatment in the same manner as States for certain purposes under the CWA. See 33 U.S.C. 1377(e).

As part of its regulatory program, the CWA provides that each State must adopt water quality standards for all waters within the State's jurisdiction and submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If EPA determines that a state standard does not meet minimum federal requirements, then EPA disapproves the standard. The State may then adopt changes suggested by EPA, or failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).[1]

---

[1] In addition to water-quality-based requirements, the CWA also provides for technology-based requirements, which take into account the capability of existing pollution-control technologies to remove particular pollutants from effluents. EPA or the State may establish effluent limitations, reflecting technology-based requirements for discrete categories and classes of point sources, that restrict the quantities, rates, and concentrations of specified pollutants that may be discharged into water from the point sources. See 33 U.S.C. 1311, 1342. Both water quality-based and technology-based requirements are implemented for point sources through a permit process, known as the National Pollutant Discharge Elimination System (NPDES). The Act prohibits "the discharge of any pollutant" into the Nation's waters except as authorized by an NPDES permit. 33 U.S.C. 1311, 1342; see *EPA* v. *California*, 426 U.S. 200, 205 (1976). All NPDES permits must

Federal law generally prohibits States from exercising regulatory authority within Indian reservations unless Congress has authorized such action. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987); see also *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."). As originally enacted, the CWA did not specifically identify any non-federal governmental entity that had authority to set standards for waters within Indian reservations. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Indian Tribes in the same manner as States for the purposes of, inter alia, setting water quality standards for surface waters within the exterior boundaries of their reservations. 33 U.S.C. 1377(e); see Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76. Section 1377(e) states that EPA is authorized to "treat an Indian tribe as a State" for the purposes of 33 U.S.C. 1313 if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe,

---

include effluent limitations that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas*, 503 U.S. at 104-107.

> held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. 1377(e). The term "Federal Indian reservation" is defined for those purposes to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h)(1); cf. 18 U.S.C. 1151(a). Section 1377(e) directs EPA to promulgate regulations "which specify how Indian tribes shall be treated as States for purposes of this chapter" and to provide a mechanism for resolving disputes between States and Indian Tribes located on common bodies of water. 33 U.S.C. 1377(e).

2. In accordance with Section 1377(e)'s directions, EPA has promulgated regulations for the treatment of Indian Tribes in the same manner as States. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). EPA's regulations set out four criteria, embodying the statutory requirements of Section 1377, that an applicant must meet to receive TAS status. See 40 C.F.R. 131.8(a); Pet. App. 89a.

First, the applicant must be a federally recognized Indian Tribe that exercises governmental authority over a federal Indian reservation. 40 C.F.R. 131.8(a)(1), 131.3(k) and (*l*); see 33 U.S.C. 1377(e)(1) and (h). Second, the Indian Tribe must have a governing body that carries out "substantial governmental duties and powers." 40 C.F.R. 131.8(a)(2); see 33 U.S.C. 1377(e)(1). Third, the water quality standards program that the Indian Tribe seeks to administer must pertain to the management and protection of water resources that are within the borders of the Indian reservation. 40 C.F.R. 131.8(a)(3); see 33 U.S.C. 1377(e)(2). Fourth, the Indian Tribe must reasonably be expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and the relevant regulations. 40 C.F.R. 131.8(a)(4); see 33 U.S.C. 1377(e)(3).

EPA's regulations also set out the procedural requirements that Indian Tribes must follow to apply for and obtain TAS status. 40 C.F.R. 131.8(b) and (c); Pet. App. 89a-92a. The Tribe must submit a detailed application to the appropriate EPA Regional Administrator demonstrating that the Tribe satisfies the prescribed criteria for TAS status. 40 C.F.R. 131.8(b). The Regional Administrator provides notice of a Tribe's application to all appropriate governmental entities and allows 30 days for the submission of comments on the Tribe's assertion of authority. 40 C.F.R. 131.8(c)(2)(ii) and (c)(3). The Regional Administrator then determines, based on the Tribe's application, comments received, and other relevant information, whether the Tribe "has adequately demonstrated that it meets the requirements" for treatment in the same manner as a State. 40 C.F.R. 131.8(c)(4).

Section 1377(e)(2) allows Tribes to implement portions of the CWA when "the functions to be exercised by the Indian Tribe pertain to the management and protection of water resources * * * within the borders of an Indian reservation." 33 U.S.C. 1377(e)(2). EPA has made a judgment to look to this Court's precedents respecting inherent tribal authority for guidance on how to implement the statutory TAS program and to address non-Indian interests, including the interests of non-Indians who own fee lands within a reservation. EPA observed, in the preamble to its regulations, 56 Fed. Reg. 64,876 (1991), that an Indian Tribe may have "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Pet. App. 95a (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)). EPA therefore decided that, in implementing Section 1377(e) in situations where non-members would be affected, the agency would take account of the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. 96a.

Rather than establishing a bright-line rule, EPA stated that "the ultimate decision regarding Tribal authority [over non-members] must be made on a Tribe-by-Tribe basis," Pet. App. 95a, and the "extent of such tribal authority depends on the effect of th[e] activity on the tribe," *id.* at 96a. EPA determined that it would proceed on the premise (which EPA termed an "interim operating rule") that the Tribe should be required to show in all cases that the "potential impacts of regulated activities on the tribe are serious and substantial." *Id.* at 97a. But EPA also observed that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." *Ibid.* It ultimately concluded that "[t]he determination as to whether the required effect is present in a particular case depends on the circumstances." *Ibid.*

3. The Band applied to EPA for TAS status for the purpose of developing water quality standards for all surface waters within the boundaries of the Mole Lake Reservation (the Reservation) in northeastern Wisconsin. Pet. App. 50a. Although a Tribe may also seek authorization to administer an NPDES permit program within its reservation, see note 1, *supra*, the Band did not request that additional authority. In accordance with EPA's regulations, petitioner was provided with an opportunity to comment on the Band's application. Petitioner disputed the Band's authority to set water quality standards within the Reservation on the basis of petitioner's claim that it held title to the beds of the lakes within the Reservation. *Id.* at 69a. EPA considered the materials submitted by both the Band and petitioner. It determined that the waters in question are within the Reservation, *id.* at 52a, and that the Band has authority under EPA's regulations to develop water quality standards for all surface waters within the Reservation's boundaries, *id.* at 39a-47a, 52a-53a.

4. Petitioner filed suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging EPA's decision to grant the Band TAS status to establish water quality standards under the CWA. Pet. App. 22a. Petitioner claimed that it held title to the beds of navigable lakes within the Reservation under the Equal Footing Doctrine and that the Band, therefore, could not set water quality standards for those waters. *Id.* at 21a. The district court granted summary judgment for EPA and the Band, concluding that EPA's decision is reasonable and consistent with

the CWA and EPA's implementing regulations. *Id.* at 32a.

5. A unanimous court of appeals panel affirmed. Pet. App. 1a-14a. The court noted at the outset that two factors are highly pertinent to the Tribe's interest in assuming responsibility for water quality standards within the Reservation: "First, the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. * * * Second, all of the 1,850 acres within the reservation are held in trust by the United States for the tribe." *Id.* at 4a-5a.

Like the district court, the court of appeals rejected petitioner's argument that, because it claimed to hold title to the beds of navigable lakes under the Equal Footing Doctrine, the Band is not entitled to specify water quality standards for those lakes. Pet. App. 7a-10a. The court of appeals reasoned that, assuming arguendo that petitioner does have title to the lake beds, *id.* at 7a-8a, the Tribe's issuance of water quality standards for the lakes is consistent with petitioner's ownership of the land beneath the water, *id.* at 8a-10a.

The court of appeals acknowledged that the Band's establishment of water quality standards for surface waters within its Reservation could conceivably affect activities outside of the Reservation. Pet. App. 10a.[2] The court noted, however, that Congress had provided for that possibility by directing EPA to create "a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" (33 U.S.C. 1377(e)). Pet. App. 10-13a. The court noted that, in any event, petitioner "exaggerates" the possibility of such speculative conflicts. See *id.* at 13a. The court of appeals concluded that EPA's grant to the Band of authority to issue water quality standards for surface waters fully within the Reservation's boundaries is reasonable on the facts of this case and not otherwise contrary to law. *Id.* at 14a.

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[2] Most significantly, NPDES permits issued to a discharger in an upstream State may need to include limitations if necessary to meet the applicable downstream water quality standards. *Arkansas* v. *Oklahoma*, 503 U.S. at 107; see *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996); Pet. App. 11a (citing *City of Albuquerque* v. *Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997).

ARGUMENT

The court of appeals correctly concluded that EPA acted within its authority under 33 U.S.C. 1377(e) of the Clean Water Act in authorizing the Mole Lake Band to set water quality standards for surface waters wholly within its reservation and wholly surrounded by tribal lands. That fact-specific decision does not conflict with any decision of this Court or any other court of appeals, and it does not raise any issue of exceptional importance warranting this Court's review.

1. This Court normally does not review a court of appeals' decision affirming a federal agency's application of a federal statute to particular factual circumstances in the absence of a square conflict among the courts of appeals on the meaning of the statute. Petitioner does not contend that this case presents such a conflict. To the contrary, the two other courts of appeals that have considered EPA grants of TAS status to Tribes to set water quality standards for their reservations have similarly sustained EPA's exercise of its authority under Section 1377(e).

In *City of Albuquerque* v. *Browner*, 97 F.3d 415, 419, 425-426 (1996), cert. denied, 522 U.S. 965 (1997), the Tenth Circuit upheld EPA's regulations and its approval of the Pueblo of Isleta's water quality standards. The court ruled that EPA had properly incorporated those standards into an NPDES permit issued to the City's waste treatment facility, which discharged into the Rio Grande at a point above the reservation. See *id.* at 425-426. The court concluded that EPA's authorization of the Pueblo to establish water quality standards for purposes of the CWA "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423.

In *Montana* v. *EPA*, 137 F.3d 1135, cert. denied, 525 U.S. 921 (1998), the Ninth Circuit upheld EPA's grant of TAS status to the Confederated Salish and Kootenai Tribes to establish water quality standards throughout the Flathead Reservation. The court "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.* at 1141.

The court of appeals' decision in this case is consistent with *Albuquerque* and *Montana*. Like the Ninth and Tenth Circuits, the court of appeals concluded that EPA acted within its authority and discretion by granting TAS status to a particular Indian Tribe based on a "fact-specific" analysis of the factors identified in Section 1377 of the CWA and EPA's implementing regulations. Pet. App. 14a. Because the three courts of appeals that have addressed EPA's application of Section 1377(e) have spoken harmoniously, there is no occasion for this Court to intercede.

As in *Albuquerque* and *Montana*, this Court should deny the petition for writ of certiorari.[3]

2. Petitioner asserts (Pet. 11-15) that, notwithstanding the absence of a conflict among the courts of appeals, the issues raised in this case are of exceptional importance warranting this Court's review. Petitioner specifically contends (Pet. 14-15):

> Unless EPA's policy is corrected, large numbers of nonmembers of [Indian tribes] in this country may find, to their considerable surprise, that they have become subject, either directly or indirectly, to the authority of tribal governments in which they have no rights to participate and which may provide limited opportunity for fair review of adverse tribal decisions. This is particularly true on reservations, like some in Wisconsin, populated by large numbers of nonmembers.

Petitioner further asserts (Pet. 15) that the instant case provides "a good vehicle for addressing the limits of tribal sovereignty over nontribal resources and persons."

Petitioner is mistaken as to the practical effect of this decision and its suitability as a "vehicle" for addressing the issues that petitioner contends are "fundamentally important" (Pet. 15). This case involves a fact-specific application of Section 1377(e) to one relatively small Indian reservation. Moreover, as the court of appeals' decision points out, the Mole Lake Reservation is "unusual" in that "[n]one of the land within the reservation is controlled or owned in fee by non-members of the tribe." Pet. App. 4a-5a. Unlike *Montana* v. *EPA*, in which the Court denied review, the issue of tribal regulation of nonmembers living within the boundaries of an Indian reservation is wholly absent from this case. Furthermore, it is currently unclear what, if any, effects the Band's water quality standards will have on activities outside the Reservation. See *id.* at 13a ("granting TAS status to tribes simply allows the tribes some say regarding [water quality] standards and permits"). Hence, this case is a particularly poor vehicle for assessment by this Court of the effects of a Tribe's TAS status on non-Indians.[4]

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[3] Petitioner mistakenly suggests (Pet. 13) that in this case, unlike *Montana*, the court of appeals deferred "to EPA's legal analysis of Indian law precedent." Rather, the court of appeals stated that EPA's "regulations and subsequent decision" were entitled to deference. Pet. App. 6a. The court of appeals did not defer to EPA's interpretation of case law, nor did the government suggest that the court should do so. See Gov't C.A. Br. 14 n.8 ("EPA, of course, agrees with Wisconsin (Br. 15) that the Agency's interpretation of case law is reviewed by this Court *de novo*.").

Petitioner's suggestion (Pet. 12-13) that this decision will inevitably lead to tribal regulation of waterways throughout Wisconsin vastly exaggerates the impact of this case. The Band's reservation encompasses a mere 1850 acres, all of which are held by the United States in trust for the Band. EPA granted TAS status based on an individualized assessment of the Band's circumstances, Pet. App. 37a-47a, in accordance with the agency's view that "the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis," *id.* at 95a. As the court of appeals correctly observed (*id.* at 14a), EPA's grant of TAS status to the Mole Lake Band is justified by the Band's substantial reliance on the Reservation's water resources and the complete absence of "fee land within the reservation owned by non-members of the tribe." Because EPA's determination here was "fact specific," the court of appeals left for "another day" how far a tribe's authority might extend "on a different set of facts." *Ibid.* The court of appeals' explicitly limited rationale and the record here therefore contradict petitioner's claim (Pet. 12) that "[i]f the decision below is allowed to stand, Wisconsin will lose much of [its] authority with respect to hundreds of navigable waterways."[5]

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[4] Petitioner has filed a separate suit specifically challenging the Band's water quality standards, which would be more likely to encounter such questions. See *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996). On June 17, 1999, the district court administratively closed that case, subject to reopening within 90 days after the outcome of the appeal in this case. See *id.*, Docket Sheet Entry No. 26 (June 18, 1999).

3. The court of appeals correctly rejected petitioner's novel claim (Pet. 15-22) that tribal TAS status pursuant to a federal statute regulating water quality is incompatible with a State's ownership of lands underlying navigable waters pursuant to the Equal Footing Doctrine. Like EPA and the district court, the court of appeals assumed, arguendo, that petitioner owns lands underlying some of the surface waters within the Reservation, but it nevertheless decided that such

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[5] Petitioner also overstates the national significance of the TAS program. Petitioner contends (Pet. 13) that "over 210 tribes nation-wide have received TAS status *under various provisions* of the Clean Water and Safe Drinking Water Acts" (emphasis added). This case, however, involves TAS status to establish water quality standards, and not TAS status for other programs. EPA informs us that, out of a total of 49 applications for TAS authority to establish water quality standards over the past decade, EPA has approved 23. As noted above, those approvals have generated only three court of appeals decisions since the issuance of EPA's regulations in 1991.

ownership would not affect the Tribe's qualifications for TAS status. Pet. App. 7a-10a.[6]

As the court of appeals recognized, petitioner's reliance on its asserted title is misplaced because Congress did not condition a Tribe's entitlement to TAS status on that criterion. Pet. App. 8a-10a. Congress, which "has plenary authority to legislate for the Indian tribes in all matters," *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978)), set out the relevant standards for TAS status in Section 1377(e). It provided that Indian Tribes may qualify for TAS status for certain CWA purposes, not only with respect to water resources that are held by or on behalf of the Tribe or its members, but also with respect to water resources that are "otherwise within the borders of [the] Indian reservation." 33 U.S.C. 1377(e)(2). Congress, which indisputably has authority to empower the EPA to set water quality standards for navigable waters without regard to who owns the underlying submerged lands, directed EPA to allow qualifying Indian Tribes to make those determinations (within the parameters of the federal statutory Clean Water Act program) for all waters within the exterior boundaries of their reservations. As the court of appeals correctly observed, "[b]ecause [petitioner] does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so." Pet. App. 9a-10a.[7]

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[6] For the purposes of the Equal Footing Doctrine, navigable waters are those that were navigable in fact at statehood. *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). Navigable streams or lakes are those on "which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Ibid.* Contrary to petitioner's contention (Pet. 19), EPA has not conceded that petitioner owns the beds of the navigable waters of the Reservation. Pet. App. 44a, 52a. The determination of navigability requires a fact-intensive inquiry for each water body. There is no evidence in the record of this case, one way or the other, on the questions of what water bodies were navigable in fact at the time of Wisconsin's statehood in 1848 and what property interest petitioner has retained in the beds under those water bodies.

Congress's direction that EPA may grant a qualifying Tribe TAS status with respect to all waters within the borders of a reservation is particularly appropriate in this case, because the Reservation contains no lands owned in fee by non-members of the Tribe. Rather, the Reservation uplands indisputably consist entirely of lands owned wholly by the United States in trust for the Band, which has regulatory authority over all of its members. Cf., *e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001) (Navajo Nation does not have inherent power to tax non-Indian on non-Indian fee land on Reservation). EPA properly concluded, in light of those facts, that the Band "necessarily possess[es] authority over all persons on Reservation lands who may be engaging in activities that may affect the quality" of the Reservation's waters. Pet. App. 45a. Thus, EPA concluded that, even if the State holds title to certain submerged lands, the Band's authority is nonetheless sufficient to "adequately regulate virtually all activities which might affect the quality of Reservation waters." *Ibid.* Under those circumstances, the court of appeals held that it was "reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water." *Id.* at 10a. Petitioner has made no showing that those fact-specific findings are erroneous.

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[7] Significantly, neither Section 1377 of the CWA nor its legislative history mentions the Equal Footing Doctrine or submerged lands. Furthermore, the court of appeals found that petitioner has waived any claim that Rice Lake and other water bodies are somehow not "within the borders" of the Reservation. Pet. App. 7a.

Contrary to petitioner's assertions (Pet. 19), the court of appeals' decision does not conflict with this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981). Petitioner essentially argues that *Montana* stands for the proposition that, if a State holds title to submerged lands, then a Tribe may never exercise any regulatory authority respecting the overlying waters. But *Montana* contains no such holding. In that case, this Court determined that the State owned the bed of the Big Horn River. See *id.* at 556-557. It nevertheless did not find the State's ownership dispositive of the Tribe's authority to regulate non-member fishing and sport hunting in and on those waters. Compare *id.* at 550-551 n.1, with *id.* at 557-567. Petitioner's understanding of *Montana* and its consequent assertion that this case conflicts with *Montana* are accordingly wrong.

The Court stated in *Montana* that, as a general rule, Tribes lack inherent authority to regulate the conduct of non-members on non-Indian lands within reservations. 450 U.S. at 557-567. But the Court recognized that the general rule is subject to important exceptions. In particular, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. See, *e.g.*, *Brendale, supra.* EPA has taken guidance from *Montana* in determining whether a Tribe is entitled to TAS status under Section 1377(e) of the CWA. It has elected to "evaluat[e] whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation" by reference to "the evolving case law as reflected in *Montana* and *Brendale.*" Pet. App. 96a. EPA conducted that evaluation in this case and found that, because the Band depends on the water resources at issue for its livelihood and cultural integrity, and because the Band's reservation contains no nonmember fee lands, granting the Band authority to determine water quality standards for those waters is consistent with *Montana. Id* at 45a-47a. Hence, EPA's grant of TAS status to the Band pursuant to Section 1377(e) is fully compatible with *Montana.*

As the court of appeals correctly recognized, the Band's entitlement to TAS status ultimately depends on the authority that Congress made available to Indian Tribes through Section 1377(e). Unlike *Montana,* this case does not arise out of a Tribe's bare assertion of inherent authority, but under the specific provisions of the CWA, which establishes a complex regulatory scheme and charges an expert agency with responsibility to coordinate the activities of the federal government, the States, and Indian Tribes. See 33 U.S.C. 1377(e). Section 1377(e) and EPA's implementing regulations allow eligible Tribes to play a role with respect to all water resources within their reservations and do not draw the distinction that petitioner urges.[8]

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[8] Petitioner relied heavily below (Pet. App. 8a, 30a-31a) on the court of appeals' decision in *Wisconsin* v. *Baker*, 698 F.2d 1323,

4. Petitioner also contends (Pet. 22-25) that EPA has misinterpreted this Court's post-*Montana* precedents. There is no merit to that contention. Petitioner primarily asserts (Pet. 24) that this Court's decision in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), narrowed the *Montana* exception such that EPA cannot rely on the Band's interest in the "health and safety" of its members in granting TAS status. That is not so. In *Strate*, this Court held that a Tribe's inherent sovereignty did not extend so far as to create a tribal court forum for a "commonplace state highway accident claim." 520 U.S. at 459. The Court did not, however, narrow the *Montana* exception. To the contrary, *Strate* identified *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and reaffirmed the *Montana* test verbatim. *Id.* at 445; see

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1335 (7th Cir.), cert. denied, 463 U.S. 1207 (1983), but the court correctly recognized that the *Baker* decision is inapposite. The court of appeals ruled in *Baker* that a Wisconsin Tribe was not entitled to regulate non-member hunting and fishing on lakes within its reservation because the State held title to the lake beds. The court nevertheless left open the possibility of tribal regulation, even when the State owned the lake beds, where necessary to protect the "'political integrity, the economic security, or the health or welfare' of the Band." *Id.* at 1335 (quoting *Montana*, 450 U.S. at 566). As the court of appeals below recognized, limitations on tribal regulation of hunting and fishing on non-tribal lands within a reservation are of little or no relevance here where the issue is tribal authority to set water quality standards pursuant to the CWA. See Pet. App. 8a-9a. Hunting and fishing rights "have traditionally been the subject of state regulation," *id.* at 8a, while "the ultimate authority for the water quality standards lies with the federal EPA, not the state of Wisconsin (which itself has acted only pursuant to federal delegation)." *Ibid.*

Nevada v. *Hicks*, 533 U.S. 353, 358 (2001) (quoting *Strate*).[9]

Here, the record shows that water quality is particularly important to the Band since the Band "is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials." Pet. App. 4a. The court of appeals based its decision, in part, on the Band's "unusual" reliance on water resources, *ibid.*, and left "for another day" the question as to how far tribal authority might extend on a different set of facts. *Id.* at 14a. In light of EPA's Tribe-by-Tribe approach, petitioner cannot credibly claim (Pet. 23) that a finding of tribal regulatory jurisdiction is necessarily "guarantee[d]" in every instance. To the contrary, the court of appeals' analysis was based on the facts in the record before it, which show that EPA correctly found that impairment of water quality would have a serious and substantial effect on the health and welfare of the Band because its "water resources are essential to its survival." Pet. App. 13a.

Petitioner also errs (Pet. 24-25) in asserting that tribal authority may be invoked only where the record reflects "a real" threat to the Tribe arising from wholly inadequate federal and state oversight. In support of that contention, petitioner again primarily relies on

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[9] Moreover, the effects of water pollution are far more threatening to a Tribe than isolated traffic accidents. As the court of appeals in *Montana* v. *EPA* explained, "the conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source." 137 F.3d at 1141. See *Albuquerque*, 97 F.3d at 423 (observing that the authority to establish water quality standards "is in accord with powers inherent in Indian tribal sovereignty").

Montana and *Strate.* But that is not what those decisions say. This Court determined in *Montana* that a Tribe lacks inherent authority to regulate non-member activity unless such activity threatens the Tribe's political integrity, economic security, or the "subsistence or welfare of the Tribe." 450 U.S. at 566. The Court noted that, in some circumstances, the State's failure to manage nonmember activities may itself create a threat to the Tribe's political integrity, economic security, or health or welfare that would warrant a Tribe's taking regulatory action. *Id.* at 566 n.16.[10] See *Lower Brule Sioux Tribe* v. *South Dakota,* 104 F.3d 1017, 1023 (8th Cir.), cert. denied, 522 U.S. 816 (1997). It did not, however, limit tribal regulatory authority to circumstances in which State or federal regulation was wholly inadequate.[11]

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[10] This Court stated:

> Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the [Tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

450 U.S. at 566 n.16.

[11] Likewise, this Court's decision in *Strate* supports no such requirement. As discussed above, *Strate* held that a tribal court lacked jurisdiction over a tort case arising from a traffic accident between non-members on a portion of state highway crossing an Indian reservation. This Court concluded that the *Montana* test was not satisfied because tribal jurisdiction over an accident involving only non-members was not "crucial to the 'political integrity, the economic security, or the health or welfare of the [Tribe]'" and was not necessary to protect tribal self-government. 520 U.S. at 459. The Court noted that a state judicial forum was available to resolve the dispute, but it did not suggest that tribal

In short, this case does not involve a "dramatic expansion" (Pet. 25) of this Court's recognition in *Montana* that Tribes retain some aspects of inherent sovereignty. Rather, this case simply involves EPA's application of Section 1377(e) of the CWA to a discrete factual situation in a manner consistent with the text of the statute, the agency's regulations, and the decisions of the only two other courts of appeals that have had occasion to interpret that statutory provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

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jurisdiction over non-members exists only in the absence of an alternative forum.

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Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

No. 01-1247

IN THE
SUPREME COURT OF THE UNITED STATES

◆

STATE OF WISCONSIN,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN and SOKAOGON
CHIPPEWA COMMUNITY,
Respondents.

◆

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

◆

AMICUS CURAE BRIEF OF THE TOWN OF HOBART, THE CITY OF GREEN BAY, BROWN COUNTY, AND OUTAGAMIE COUNTY WISCONSIN IN SUPPORT OF PETITIONER

◆

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INTRODUCTION

The decision of the Seventh Circuit will have a substantial and dramatic impact on local governments and their non-Indian citizens in and around Indian reservation areas. The Amici local governments ("Local Governments") urge this Court to grant the State of Wisconsin's Petition for Writ of Certiorari for two reasons.

First, by upholding the Environmental Protection Agency's (EPA) decision to allow tribes to establish water quality standards within their reservations, the Seventh Circuit has created precedent with far reaching impacts. Tens of thousands of persons who are not members of an Indian tribe ("non-members") may now be subject to tribal regulation for routine activities such as the development of a home site on a one-acre lot. This is because of the breadth of the Clean Water Act to which these water quality standards apply, and the large number of non-members who reside within reservation areas. Such a dramatic intrusion on the rights of non-members by tribal governments is of substantial importance and should be reviewed by this Court.

Second, the decision in this case is in direct contravention of the repeated holdings of this Court that, with limited exceptions, "Indian tribes lack civil authority over the conduct of non-members on non-Indian fee land within a reservation." *Atkinson Trading Company, Inc. v. Shirley* 532 U.S. 647 citing *Montana v. United States* 450

U.S. 544 (1981). In reaching a contrary conclusion, the Seventh Circuit erroneously deferred to EPA's interpretation of federal Indian law rather than this Court's decisions.

INTEREST OF THE AMICI

The proposed Amici consist of local governments in the State of Wisconsin that have jurisdiction in and around the Oneida reservation near the City of Green Bay, Wisconsin. ("Local Governments")[1] The Oneida Nation of Wisconsin ("Oneida") is one of four Wisconsin Indian tribes that, like the Sokaogon, was granted authority by the Environmental Protection Agency ("EPA") to promulgate and administer water quality standards under the federal Clean Water Act within its reservation. This authority, which arises out of § 518 of the federal Clean Water Act, codified as amended at 33 U.S.C. § 1377, allows tribes to be treated as states ("TAS") for implementing portions of the Clean Water Act. The Local Governments were among the numerous parties that brought suit against the Environmental Protection Agency ("EPA") challenging EPA's TAS decisions.[2]

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[1] The local governments are the Town of Hobart, the City of Green Bay, Brown County and Outagamie County, and are submitting this brief by their respective authorized law officers pursuant to Supreme Court Rules 37.4 and 37.6.

[2] See, *Brown County, et al. v. EPA*, Eastern District of Wisconsin. Case No. 96-CV-605. That case was consolidated for pre-trial processing and briefing with four other cases in the Eastern District, including the case now on review. (CR 38). Note, the designation

After the suit was commenced, EPA withdrew the Oneida TAS decision in the wake of fraud committed by two of its employees. [3] Court ordered discovery revealed that an EPA staff person and an EPA attorney back dated documents to substantiate alleged non-member impacts, inserted them in the agency record on review and subsequently filed false affidavits to the federal court denying having done so.[4] As a result of EPA's withdrawal of the decision EPA moved to dismiss the case as moot.[5] A similar fate occurred with respect to all of the Wisconsin cases except the case now before the Court.

For these reasons and the reasons set forth below in Section I, the Local Governments have a substantial interest in and a unique perspective on this case.

"CR" refers to the District Court record of the case now on review. "App" refers to the Petitioner's Appendix.

[3] EPA filed a Status Report indicating that affidavits certifying the record may contain false statements and discovery was ordered. CR 179, 196, 197.

[4] The results of the discovery were set forth in the briefs and appendices of the Plaintiffs in Opposition to the EPA's Motion to Terminate Discovery and Motion to Dismiss. See, CR 218, 222, 223.

[5] CR 201, 243.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES QUESTIONS THAT HAVE A SUBSTANTIAL EFFECT ON LOCAL GOVERNMENTS AND NON-INDIAN CITIZENS.

There are several ways in which this decision has a substantial impact on local governments and their non-member citizens. First, there are significant numbers of non-Indians and local government facilities within reservation boundaries that could be affected by this decision. Although the Sokaogon reservation consists of contiguous parcels of land, which are either owned by the tribe and its members, or held in trust for the tribe and its members,[6] many reservation areas do not have those characteristics.

For example, of the 65,000 acres that originally comprised the Oneida reservation near Green Bay, Wisconsin, approximately 85% of the land is owned by non-Indians, and over 85% of the population, nearly 18,000 citizens, are non-Indians.[7] These demographics are not a recent phenomenon. To the contrary, these demographic patterns go back nearly a hundred years. The reservation was created for Oneida tribal members by treaty in 1838.[8] However, Oneida reservation land was subsequently allotted to individual Oneida members pursuant to the General Allotment Act of 1887, 24 Stats. 338. By the mid-1920s, only a few hundred acres of the original reservation remained in Indian hands, the rest passed to non-members.[9]

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[6] All of the 1850 acres of the Sokaogon reservation are in trust status. App. 29a.

[7] See, Complaint in *Brown Co. et. al. v. EPA*, E.D. Wis., Case No. 96-CV-605; CR 1.

In the decades following the completion of the allotment process, state and local authorities exercised civil, criminal and regulatory jurisdiction of the reservation area. In 1908, the Wisconsin Legislature authorized the creation of the Town of Hobart and the Town of Oneida from the land set apart pursuant to the 1838 treaty. For nearly 100 years, the local governments of the State of Wisconsin have been providing public services, including roads, schools, police and fire protection and other services, to tribal and non-tribal members alike.

Currently, town and county governments operate a variety of public facilities within the reservation boundaries, including the following:

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[8] This treaty, known as the 1838 Treaty of Washington, was executed on February 3, 1838, 7 Stats. 566.

[9] J. Lampisi and L. Hauptman eds., The Oneida Experience: Two Perspectives (1988) p.85.

- The Brown County airport, Austin Straubel International Field;
- The Brown County Golf Course;
- An elementary school;
- Three fire stations;
- Three parks, comprising 54 acres; and
- 97 miles of town and county roads, not including state highways.

Second, the scope of non-member activities potentially impacted by the adoption of tribal water quality standards is extremely broad. While it may first appear that the ability of tribes to set water quality standards under § 303 of the federal Clean Water Act[10] is not likely to affect individual citizens and local governments, nothing could be further from the truth. Historically, water quality standards primarily affected discharge permits required under § 402 of the federal Clean Water Act for discharges from municipal or industrial facilities.[11] Today, however, the program is far broader in application. Among other things, Clean Water Act permits are required for discharges of stormwater from construction sites of one to five acres or more.[12] For example this could include the development of a one-acre home site. If a tribe has the ability to set water quality standards, those standards must be incorporated into any Clean Water Act permit, including a stormwater permit.[13]

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[10] 33 U.S.C. § 1313.

[11] 33 U.S.C. § 1342.

[12] 33 U.S.C. § 1342(p). Currently, federal regulations apply to construction sites of five acres or more. *See,* 40 C.F.R. § 122.26(b)(14)(x). However, on December 8, 1999, EPA promulgated Phase II of its stormwater regulations which requires permits for construction sites of one acre or more, effective in March 2003. *See,* 64 Fed. Reg. 68722.

In addition to wastewater discharge permits, the federal Clean Water Act also requires a permit for the discharge of fill material into waters of the United States and wetlands. These permits are issued by the U.S. Army Corps of Engineers under § 404 of the Clean Water Act.[14] Whenever a § 404 permit is issued, the state or tribe must certify that the federal permit meets state or tribal water quality standards. This process, known as water quality certification, effectively allows a state or tribe to veto a federal permit.[15] Thus, if a tribe were to establish water quality standards under its grant of TAS authority, a non-member would now be required to obtain water quality certification from the tribe for a wetland fill of as little as 0.1 acres. Thus tribal water quality standards would provide the basis for vetoing the federal permits.

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[13] Historically tribes have applied for TAS status to set water quality standards, under § 303, rather than authority to actually issue Clean Water Act permits under § 402. In such a case EPA takes the position that it has the authority to issue the permits. However, EPA is bound to use tribal water quality standards. Once a tribe is granted TAS status for § 303, its ability to obtain authority under § 402 is enhanced, because the basic standards for granting such status are the same.

[14] 33 U.S.C. § 1344.

[15] 33 U.S.C. § 1341.

While the above examples concern individual citizens, the same is true if any one of the Local Governments required a federal permit to fill wetlands as part of a utility or road crossing or a permit for the construction of a stormwater detention pond. Given the number of public facilities in the Oneida reservation area, this is not an idle concern. Expansion of airport facilities, road projects, school expansions and park improvements are among the activities that could trigger permitting obligations that involve water quality standards.

Third, the tribal water quality standards proposed to date give substantial discretion to tribal authorities. For example, the water quality standards proposed by the Oneida under its TAS authority included broad narrative criteria that provided in part :

> Any activities that degrade the aesthetic quality, stability and/or ecological integrity of the waters of the reservation shall be prohibited unless authorized in a manner consistent with the water quality standards contained herein.

Equally disconcerting, EPA itself has not limited tribal water quality standards to those which are scientifically justified. Instead, EPA has stated that tribal water quality standards need not "require justification or other evaluation of the scientific merit of criteria" provided that they meet minimum federal standards. 56 Fed. Reg. 64886.

These concerns are further compounded by various procedural shortcomings. At least in the case of Oneida, there was no provision for judicial review of tribal decisions. The review of decisions by the Oneida including the denials of water quality certification would only be subject to tribal administrative review procedures. Contrast this with the rights that other citizens of the State of Wisconsin have with respect to water quality issues. Currently, when Wisconsin issues water quality certifications, those decisions are subject to administrative review through contested cases procedures, under Wis. Admin. Code Ch. NR 299 and Wis. Stats. § 227.42. In addition, any adverse decision by the DNR may be appealed as a matter of right to the state court system. Wis. Stats. § 227.53.

For all of these reasons, a determination that tribes have the inherent authority to set water quality standards will have far-reaching impacts on non-Indian citizens and local governments.

II. THE DECISION BY THE SEVENTH CIRCUIT UPHOLDING EPA'S GRANT OF TAS STATUS IS IN DIRECT CONTRAVENTION OF THIS COURT'S RULINGS.

In its Petition for Review, the State of Wisconsin presents two issues for review. The first raises the question whether Indian tribes possess inherent authority to regulate navigable waters within its reservation, when under the Equal Footing Doctrine a state holds and exercises sovereignty over such waters and the submerged lands beneath them. The Amici concur with the State's analysis and do not have additional matter to bring to the attention of the Court.

The second question presented in the State's petition is whether EPA policy that tribes possess an inherent authority to establish water quality standards for non-members. This is a matter in which the local governments and its citizens have a direct interest.

A. This Court Has Established Guiding Principles That Circumscribe The Scope Of Tribal Jurisdiction Over Non-Members.

Montana v. United States, 450 U.S. 544 (1981) has been described as the pathmarking case concerning tribal civil authority over non-members, *Strate v. A-1 Contractors,* 450 U.S. 438, 456 (1997) and more recently as "the most exhaustively reasoned of our modern cases" addressing tribal authority, *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645 (2001). See also, *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). *Montana* and its progeny have articulated three guiding principles governing the scope of tribal authority over non-members.

The first guiding principle from *Montana* is "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565. This principle stems from the fact that "the Indian tribes have lost many attributes of sovereignty," and " 'the areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. ...'" Id. at 563-64 citing *U.S. v. Wheeler*, 435 U.S. 313, 326 (1978). Given this divestiture of jurisdiction, the Montana Court emphasized that:

> Exercise of tribal power beyond what is necessary to protect tribal self – government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation. 450 U.S. at 564.

This general rule and its underlying rationale have been the starting point for analysis in every case involving tribal jurisdiction over non-members since *Montana*. See, *Hicks*, 533 U.S. at 359; *Atkinson*, 532 U.S. at 650-651; *Strate* 520 U.S. at 446, and *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 426 (1989).

This general rule is particularly strong where the regulation pertains to non-members on **non-member fee**

land, which is the situation of concern to the Amici. As this Court recently noted, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction" *Hicks,* 533 U.S. at 360. Thus, in *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) this Court held:

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of land by others.

The second guiding principle that has emerged from recent cases is that the exceptions to the *Montana* general rule are to be **narrowly** construed. The *Montana* Court offered two exceptions to its general rule, the second one of which is the basis of EPA's policy in this case. That exception provides as follows:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the

> health or welfare of the tribe. 450 U.S. at 566.

This Court's recent rulings have repeatedly emphasized that this exception is a narrow one. In *Strate*, the Court explained the *Montana* second exception as follows:

> The Court's statement of *Montana's* second exceptional category is followed by citation of four cases, *ibid*.; each of those cases raise the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government.
>
> * * *
>
> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. ...But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or control internal relations." 450 U.S. at 564. *Strate,* 520 U.S. at 458-459.

Based on that analysis, the Court in *Strate* concluded that even when persons endanger the safety of tribal members by driving carelessly on a public highway, the mere presence of a safety concern does not rise to the level of a threat to tribal self-government.

In this Court's two most recent pronouncements on the second exception, the analysis in *Strate* was reinforced and strengthened. In *Atkinson*, this Court held that even though the tribe had an economic interest in imposing a tax on the petitioner's operation of a hotel on non-Indian fee land, such an interest did not have a direct effect on the political integrity, economic security or the health or welfare of the tribe. 532 U.S. at 657. Most recently, in *Hicks,* this Court reaffirmed that the second exception must be understood by looking at the few examples of tribal power to which *Montana* referred. Based on that analysis, the Court concluded that tribal self government would not be impaired by adjudicating in state court a tribal members claims of misconduct against state officers, even when such acts allegedly occurred on tribal land. 533 U.S. at 364.

In short, the mere presence of a public health, safety and welfare issue that affects the tribe does not give rise to tribal jurisdiction over non-members. The touchstone is whether those impacts are sufficiently serious so as to impair the ability of tribal self-government.

The final guiding principle that emerges from *Montana* is that any inquiry as to whether the *Montana* exceptions are met must be a particularized factual inquiry. The Court in *Montana*, determining that the second exception did not apply, evaluated whether there were any actual impacts of the alleged hunting and fishing that would threaten the tribe's political or economic security. In that regard, the Court also looked at the protective effect that state regulations would have on protecting any tribal interests. 450 U.S. at 566-567.

In *Bourland*, this Court remanded the case for a particularized inquiry of the facts. While the lower courts found the non-member activity vexatious to individual Indians, the Court on remand concluded that the activities did not amount to a direct effect on the tribe as a whole. See, *State of South Dakota v. Bourland*, 39 F. 3d. 868, 870 (8th Cir. 1994). This same level of particularized analysis can be seen in *Strate*, 520 U.S. at 459, *Atkinson*, 532 U.S. at 657-659, and *Hicks,* 533 U.S. at 371.

B. EPA's TAS Policy, Upheld By The Seventh Circuit, Is In Direct Contravention To This Court's Guiding Principles On Tribal Regulation Of Non-Members.

EPA concluded that the Clean Water Act did not constitute a delegation of Congressional authority to tribes, and therefore that tribes would be required to demonstrate they had inherent authority to regulate non-members. 56 Fed. Reg. 64880; App. 105a. EPA articulated its policy for determining whether tribe had inherent authority in *1991 shortly after this Court's* decision in ***Brendale***, and noted that the ***Brendale*** case had generated controversy and uncertainty. App. 93a-97a. In response EPA applied a rule that would require "a showing that the potential impacts of regulated activities [by non-members] on the tribe are serious and substantial." App. 97a.

However, EPA concluded that all a tribe would have to do to meet that test is to assert that there is an impact. Once done, EPA would **presume** that there is an adequate showing of jurisdiction:

> The tribe must also explicitly assert that the impairment of such waters by the activities of non - Indians would have a serious and substantial affect on the health and welfare of the tribe. Once the tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, **presume that there has been an adequate showing of tribal jurisdiction of fee lands,** unless an appropriate governmental entity (e.g. an adjacent tribe or state) demonstrates a lack of

> jurisdiction on the part of the tribe. (Emphasis added.)

56 Fed. Reg. 64, 879; App. 100a.

EPA based this presumption on generalized findings that asserted any activities which affect surface water have serious and substantial impacts on the health and welfare of the tribe, App. 98a, and that such impacts meet the requirements of the second *Montana* exception. Indeed EPA concluded that because the management of water quality serves the purpose of protecting public health and safety, it is a core governmental function whose exercise is essential to self-government. App. 99a-100a.

Not surprisingly, given this standard, EPA freely admitted that "the agency believes that tribes will usually be able to meet the agency's operating rule." App. 97a. This conclusion is bolstered by the fact that even in those rare cases that EPA deems the TAS application to be inadequate, it will work with the tribe in order to establish TAS status. App. 107a.

This approach is fundamentally at odds with the three governing principles of this Court noted above. First, instead of beginning with the general rule that tribes do not have regulatory jurisdiction over non-members, EPA creates a **presumption** that tribal jurisdiction over non-members exists. This turns the *Montana* rule completely on its head.

Second, the EPA analysis takes the narrow *Montana* exception and converts it into the general rule. Contrary to this Court's repeated admonitions that the second exception only applies where it is necessary to protect tribal self-government or control internal relations, EPA asserts that any program that protects public health and safety is a "core governmental function" necessary to protect tribal self-government. App. 99a-100a. This type of analysis was squarely rejected by this Court in *Strate*, *Atkinson* and *Hicks*. Protection of public safety, taxation and control over the exercise of civil process, are all core governmental functions, but none were held to be necessary to protect tribal self-government. The question is whether the promulgation of water quality standards was necessary to protect tribal self-government. That question was never considered by EPA or by the Seventh Circuit.

Finally, EPA relies heavily if not almost exclusively on generalized findings as opposed to the kind of particularized inquiry that *Montana* and the cases since *Montana* have required. In contrast to *Montana,* EPA refuses to look at whether state regulations are adequate to protect the tribe from non-member impacts. Instead it again substitutes assumptions for analysis.

EPA's confusion over federal Indian law may have been understandable in the short time immediately following the *Brendale* decision. But whatever confusion may have existed at one point has certainly been resolved by the numerous cases this Court has issued since that time. EPA should not be allowed to continue to utilize a flawed and outdated analysis as a means of conferring tribal authority over tens of thousands of non-members and their activities.

CONCLUSION

For the foregoing reasons the Amici respectfully request that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 3 day of May, 2002.

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Supreme Court, U.S.
FILED

MAY 3 2002

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No. 01-1247

IN THE

Supreme Court of the United States

STATE OF WISCONSIN,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF FIDELITY EXPLORATION & PRODUCTION COMPANY

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF FIDELITY EXPLORATION & PRODUCTION COMPANY

INTEREST OF *AMICUS CURIAE* [1]

A. FIDELITY EXPLORATION & PRODUCTION COMPANY

Fidelity Exploration & Production Company ("Fidelity") is a coal bed natural gas ("CBNG") exploration, development and marketing company with large fee land and state and federal lease holdings in the Powder River Basin in southeast Montana and northeast Wyoming. It is a subsidiary of Montana Dakota Utilities Resources, headquartered in Bismarck, North Dakota.

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[1] No person or entity other than the named *amicus curiae* and their counsel have made monetary contributions towards this brief, and no counsel for any party played any role in the preparation of the brief. The *amicus curiae* have filed with the Clerk of the Court the consents of counsel for petitioners and respondents to file this brief.

B. EXPLANATION OF *AMICUS* INTEREST

1. Development of CBNG

The Powder River Basin contains vast reserves of CBNG which now figure prominently in the national energy policy, and therefore the security plans, of the United States. *Nakashima, E., Interior Official Challenges EPA Report on Energy Site,* Washington Post, April 25, 2002, at A27: "the nation's largest domestic energy exploration project. . . .the Powder River Basin's coal bed methane gas project has become a crucial part of the Bush administration's energy plan." CBNG in the Powder River Basin is an extremely clean and abundant source of fuel, requiring very little modification after its extraction from coal seams prior to introduction into the nation's natural gas pipeline system.

Fidelity owns producing CBNG wells in Montana and Wyoming situated upstream, that is South, of the Northern Cheyenne Reservation ("Reservation") in the Tongue River basin, a part of the Powder River Basin. After the completion of ongoing environmental review processes by the federal government, the State of Montana and the State of Wyoming and adoption of indicated protection and mitigation measures, Fidelity plans to further develop its fee land and leasehold property interests by drilling thousands more CBNG wells.[2]

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[2] Fidelity is not alone in its ownership of CBNG mineral rights in the Powder River Basin. Across sixteen counties of Montana and more in Wyoming and encompassing hundreds of thousands of acres of fee-owned land and state and federal leases, numerous other energy companies, some

CBNG is produced by drilling small-footprint wells, eventually housed in a dun-colored box about the size of a large dog house, 100 to 300 feet into the earth to the first or second level coal seam in the Powder River Basin. These wells then pump out water trapped in the coal seam, reducing the pressure that keeps the CBNG in place. (This does not require pumping all the water out of the coal seam, which in fact would be counterproductive. Rather, it requires pumping only enough, and only as long as necessary, to allow the CBNG molecules to essentially disentangle themselves from the coal molecules and begin migrating up the well shaft. When the CBNG supply is captured, pumping ceases and recharge of the aquifer begins, reaching 80% to 90% of the original level in a relatively short time.) The CBNG is then trapped, transported by pipelines to a central collection point that serves a group of wells, and further transported and pressurized before introduction into the nationwide pipeline system.

Surface water in the Powder River Basin is always limited and often scarce, especially in high summer and drought years. Most of the sparse rural population in the area, primarily farmers and ranchers, obtain household drinking, cooking and bathing water, as well as all-important stock water, from these coal seams. This is the same water discharged from CBNG wells. It is plentiful and of high quality, suitable without modification for these human and livestock watering uses. However, some soils within the basin do not react well to certain characteristics of the CBNG water, and therefore it is not useful on all soils for irrigation purposes on a regular basis.[3] Consequently, regulation of

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international in reach and some much smaller, have producing wells in Wyoming and plans for development in the Powder River Basin in Montana.

[3] The Electrical Conductivity ("EC") and Sodium Adsorption Ratio ("SAR") of the CBNG water from the Powder River Basin are generally

discharges of CBNG produced waters in excess of what local ranchers and farmers can use is necessary.

The Department of Environmental Quality ("DEQ") of the State of Montana regulates Fidelity's discharges of CBNG water in Montana. The DEQ has issued Fidelity a Montana Pollutant Discharge Elimination System ("MPDES") permit allowing it limited discharges of CBNG water into the Tongue River.[4] The Wyoming DEQ also regulates discharges of CBNG by Fidelity and other CBNG producers. Both states currently regulate CBNG produced water using narrative water quality standards approved by the United States Environmental Protection Agency ("EPA"). Both are also examining whether to translate those standards into numeric standards.

2. Northern Cheyenne Tribe CBNG Water Quality Regulations

The executive order that established the current boundaries of the Northern Cheyenne Reservation describes the eastern border as running down the middle of the channel of the Tongue River. Exec. Or., March 19, 1900. Even though there is no CBNG development on the Reservation and, so far as Fidelity knows, none is planned, in December 2001, the Northern Cheyenne Tribe ("Tribe") proposed water quality standards specifically aimed at limiting CBNG development. The Tribe asserts that its inherent sovereignty includes jurisdiction over the water quality of the Tongue River as it flows by the Reservation, which necessarily entails control

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at levels which, if the water is used to irrigate certain clayey soils in the basin, over time may cause it to bind together, preventing some plants from absorbing it. Thus, the key constituents of concern are EC and SAR.

[4] This permit allows Fidelity to discharge no more than 1,600 gallons per minute ("gpm") of CBNG water into the river. This is roughly equivalent to the amount of water that flows through a typical garden hose.

over upstream dischargers, such as Fidelity and other CBNG producers in Wyoming. *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). As demonstrated in this case, EPA supports that assertion of tribal jurisdiction.[5]

Fidelity and other interested parties submitted comments to the Tribe pointing out that their proposed water quality standards, particularly for EC and SAR, were unduly restrictive and threatened to not only prohibit further CBNG development in the upper portion of the Tongue River basin, but potentially inhibit production from Fidelity's small (250 wells) existing CBNG production in Montana.[6] In March 2002, the Northern Cheyenne Tribe responded to the comments by maintaining that its restrictive proposed water quality standards would not be changed. The Tribe plans to adopt its final water quality standards in June of this year.

The Tribe's stated purpose for promulgating the standards is to obtain Treatment as a State ("TAS") status from EPA under the Clean Water Act. 33 U.S.C. §§ 1251, *et seq.*, ("CWA"), specifically to promulgate enforceable water quality standards under section 303 of the CWA. When the Tribe receives TAS from EPA, the Tribe will be in a position to regulate and effectively prevent all CBNG development upstream of the Reservation, whether Montana and Wyoming, acting in their sovereign capacities, would allow the discharges necessary for such development or not.

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[5] EPA's regulations, 40 C.F.R. §§ 131.3-131.9 (1996), App. 89a, in particular its anomalous construction of the exception to the general rule of *Montana v. U.S.*, 450 U.S. 544 (1981), that tribes generally lack jurisdiction over nonmembers, demonstrate this. *See* 56 Fed. Reg. 64, 876 *et seq.*, App. 93a. Its actions in approving tribal assertions of jurisdiction over navigable waters in this and other cases, *Albuquerque v. EPA*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998), leave no doubt EPA will agree with the tribe's assertion of jurisdiction over the Tongue River.

[6] From this small "play" in Montana, in the year 2001 Fidelity payed approximately $1.8 million in taxes and royalties to the State, most of which was returned to area counties, including Big Horn and Rosebud counties, which serve members of the Tribe as well as nonmembers. In Montana, and particularly in the affected counties, this is a significant sum, yet it is small compared to potential government revenues that could be derived from full development.

SUMMARY OF ARGUMENT

More than twenty years ago, in holding that as a general principle tribes lack jurisdiction over nonmembers in *Montana v. United States*, 450 U.S. 544 (1981), the Court stated that it "defies reason" that Congress, when it authorized non-Indian homesteading and settlement on reservations, would have contemplated preserving tribal inherent sovereignty over non-tribal people and lands. *Id* at 559, n. 9. It equally "defies reason" that when Congress or the Executive established reservations they intended for those tribes to have inherent sovereign authority over navigable waters bordering, running through or on those reservations. Such a result necessarily subjects nonmembers, both on and off reservations, to tribal jurisdiction, and conflicts with the equal footing doctrine, (*see Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845); *Montana v. United States*, 450 U.S. 544, 551 (1981), citing *United States v. Holt State Bank*, 270 U.S. 49, 55 1926), and the federal balance of sovereign powers established in the Constitution.

Nevertheless, EPA has expansively interpreted and applied the "second *Montana* exception" to the general rule that Tribes lack jurisdiction over nonmembers so that, in its view, which the Court of Appeals upheld here, such jurisdiction includes power to control water quality of navigable waterways. This not only conflicts with this Court's clear jurisprudence on the subject [7] but also directly threatens the sovereign power of states and the United States over not only their citizens but interstate commerce associated with such waterways. (In particular, *see South Dakota v. Bourland*, 508 U.S. 679 (1993), where the Court held a tribe lacked jurisdiction over navigable waters over land owned by the federal government; and *Montana, supra*, where the Court held that because the State of Montana owns the bed and banks of the Bighorn river under the Equal Footing Doctrine, the Crow tribe lacks jurisdiction over nonmember hunting and fishing on the river.) In short, EPA's position, and that of the Circuit Court below, assumes Tribes possess the territorial sovereignty this Court clearly held they lack, *Bourland, supra, Strate, supra,* placing Tribes in a position to negate the sovereign decisions, including interstate agreements, of states.

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[7] Since EPA promulgated its regulations in 1991, which as noted were even then out of step with this Court's decisions, the Court has been

This, in turn, effectively disenfranchises states' citizens, on whose behalf states possess and use their sovereignty. *See* Article II, Section 1, Montana Constitution (1972): "All political power is vested in and derived from the people. All government of right originates with the people, is founded

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consistent and clear about the limited scope and opportunity for tribal jurisdiction over nonmembers. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992)(Holding county has authority to impose certain taxes on fee land owned by Tribe, Court notes "very narrow" powers of tribes over nonmembers); *South Dakota v. Bourland*, 508 U.S. 679 (1993)(Applying *Montana*, Court held tribe lacked civil jurisdiction to regulate hunting and fishing by nonmembers on land and navigable waters owned by federal government within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Tribal court has no civil jurisdiction to hear tort action against nonmember arising from auto accident on highway located on easement over tribal land); *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645 (2001)(Tribe has no civil jurisdiction to tax nonmember for transaction on nonmember land); *Nevada v. Hicks*, ___U.S. ___, 121 S. Ct. 2304 (2001)(Tribal court lacks civil jurisdiction to hear civil suit against state fish and game officers who took actions against plaintiff on land owned by tribal member).

upon their will only, and is instituted for the good of the whole." It is no exaggeration to say that, if the Tribe's assertion of jurisdiction over the Tongue River succeeds and the Tribe thwarts CBNG development, then all the state's citizens will be deprived of the benefits of the sovereign decisions of the State to allow such development to go forward. This includes citizens in Dillon Montana, hundreds of miles from the site of the CBNG development, as well as those people in the directly affected counties.

Moreover, Montana's citizens, with the exception of those who are also members of the Northern Cheyenne Tribe, will be disenfranchised because, while the representatives they elected decided to pass laws and administer them in such a way so as to allow CNBG development, the Tribe, elected only by tribal members, will have been allowed to "trump" their decisions.

ARGUMENT

In fulfillment of their sovereign duties and exercising their sovereign powers, the states of Wyoming and Montana regulate the CBNG industry, which is at this time in its infancy in the Powder River Basin. Anticipating the full development of this industry and the introduction of Powder River Basin CBNG into the national energy mix, Wyoming and Montana have engaged in a great deal of environmental assessment and planning for the numerous wells that would be required to fully exploit this resource. (The Montana Statewide Oil and Gas EIS, issued in draft for public comment December 4, 2001, has the Montana Board of Oil & Gas, the DEQ and the BLM as co-lead agencies. A similar effort is taking place concurrently for that part of the Powder River Basin in Wyoming.) In this effort, they have been working with the federal government, primarily through the Bureau of Land Management ("BLM"). *Id.*

Each state has already benefitted from and anticipates far more financial benefit from the development of CBNG in the Powder River Basin in the form of royalties and tax revenues. CBNG development in Wyoming is ahead of such development in Montana and has by some estimates contributed tens of millions of dollars in the last ten years to the state and local coffers. In Montana, it is estimated that full development of the CBNG resource will produce up to $4 billion in state and local taxes over the next 20 years. *Coal Bed Methane Development, Powder River Basin of Montana: Economic and Social Impacts of Proposed Development*, prepared by Anderson ZurMuehlen & Co., P.C., March 30, 2001.

To regulate this development and anticipate and resolve any conflicts in the use of the relevant resources, most prominently the Tongue River, that may arise from such regulation, Montana and Wyoming have been in discussions for over a year. In August 2001, the two states entered an interim agreement regarding the use of the Tongue River's assimilative capacity and the use of the Tongue River basin for discharges of CBNG produced waters. This interim agreement is at this time the subject of further discussions between the Governors of Montana and Wyoming to arrive at some permanent agreement both as to regulatory measures relating to CBNG development, particularly the disposal of produced water, and sharing the resources and capacities of the Tongue River basin.

As of this date, the Northern Cheyenne Tribe has not yet submitted an application to receive TAS. Nevertheless, that is their stated intention and EPA's regulations virtually dictate that EPA will find the Northern Cheyenne Tribe qualified to receive treatment as a state. Under EPA's interpretation of *Montana v.* U.S., *supra*, and subsequent case law as upheld by the Court of Appeals in this matter, this means that EPA will find the Tribe possesses inherent sovereignty to regulate water quality matters for the Tongue River.

This places the Northern Cheyenne Tribe in a position to thwart the sovereign decisions of the states of Wyoming and Montana, and in fact, the United States of America, whose national energy plan has development of the Powder River Basin CBNG as a key component. The Petitioner clearly explained how this consequence flows directly from EPA's erroneous interpretation of the second exception to the general rule of *Montana v. U.S., supra*. While EPA's expansive interpretation of that exception appeared overbroad when it promulgated its regulations in 1991, the decisions of this Court in the intervening decade expose it as untenable and in clear conflict with the controlling law on the scope of tribal inherent sovereign authority.

Finally, and perhaps most significantly, the 7th Circuit's decision and EPA's application of *Montana v. U.S.* also essentially disenfranchise the citizens of states whose sovereign decision-making is subject to control by tribes given TAS by the EPA. The citizens of Montana and Wyoming, for example, which include tribal members, elected representatives to make policy choices, and in Montana and Wyoming, those representatives elected to allow CBNG development as regulated by their appropriate state agencies. The states have made sovereign choices to enter agreements between each other as to how they will regulate the industry and apportion the impact the industry may have in each state on the Tongue River. Allowing the Tribe to act as a "choke point" on the Tongue River would, as a practical matter, negate all these decisions.

Neither the CBNG industry in the Powder River Basin, including Fidelity, as business interests, nor the states of Montana and Wyoming, as sovereigns, are unique in finding themselves under EPA's policies subject to tribal jurisdiction.

Considering the effects of the extension of EPA's TAS program for water quality matters throughout the country reveals the importance of reviewing the Court of Appeals' decision.

For example, if EPA's interpretation of *Montana* stands, and tribes possess inherent sovereign authority over navigable waters either on or bordering their reservations, the Colorado River above the Navajo Reservation, primarily in Arizona, would be subject to the Navajo Tribe's standards; the Missouri River above the Fort Peck Reservation in eastern Montana would be subject to the Fort Peck Tribes' standards; and the Missouri would also be subject to the standards promulgated by tribes on the Fort Berthold Reservation in North Dakota, and the Standing Rock, Cheyenne River, Lower Brule, Crow Creek, and Yankton reservations in South Dakota; the Arkansas River above the Osage Reservation in Oklahoma would be subject to that Tribe's standards; the Columbia River above the Colville Reservation in Washington would be subject to that Tribe's standards, and so on.

This situation not only conflicts with but threatens the federal balance of sovereignty established in the Constitution and the individual rights it protects.

CONCLUSION

The *amicus* respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted.

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Supreme Court, U.S.
FILED

MAY 13 2002

OFFICE OF THE CLERK

(7)

No. 01-1247

In The

Supreme Court of the United States

◆

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

◆

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

◆

REPLY OF PETITIONER STATE OF WISCONSIN

◆

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ON PETITION FOR A WRIT OF CERTIORARI
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REPLY OF PETITIONER STATE OF WISCONSIN

◆

Wisconsin submits this reply to the briefs of EPA and the Tribe opposing the state's Petition for Writ of Certiorari.

I. REVIEW IS WARRANTED TO DETERMINE THE IMPORTANT QUESTION WHETHER AN INDIAN TRIBE'S INHERENT AUTHORITY EXTENDS TO THE REGULATION OF NAVIGABLE WATERS OVER WHICH A STATE EXERCISES SOVEREIGNTY PURSUANT TO THE EQUAL FOOTING DOCTRINE.

In its brief, EPA attempts to obscure and minimize the important legal issues presented by the petition. It does so by distorting the agency's own interpretation of the governing statute, and by suggesting that the outcome below was merely a pedestrian, fact-based decision derived from circumstances unique to this case. Contrary to its purpose, EPA's obfuscation of the issues reinforces the importance of this appeal.

EPA, with the sanction of the court below, has recognized a new species of tribal authority not grounded in the decisions of this Court, namely the power to regulate natural resources owned by a state and lying within the state's sovereign domain.[1] There are only two possible sources of tribal power to regulate a state's sovereign waters: inherent authority, pursuant to the principles recognized by this Court, or federal power Congress has delegated to tribes. *Montana v. United States*, 450 U.S. 544, 564 (1981) ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.") Neither exists here.

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[1] Although EPA now claims it has not conceded Wisconsin's ownership of the navigable waters at issue here, EPA brf. at 15 n.6, neither EPA nor the Tribe offered any evidence to counter Wisconsin's explicit claim of ownership of the beds. (App. 71a-72a) Nor could they plausibly do so, given that Wisconsin obtained the waters nearly 90 years before the reservation was created from the lands adjacent to the waters. (App. 108a-109a)

EPA has expressly determined that in enacting the TAS provision, 33 U.S.C. § 1377(e), Congress did not delegate any federal power to tribes. From the beginning, EPA has steadfastly concluded that the statute "authorizes use of *existing* Tribal regulatory authority for managing EPA programs, but it does not grant additional authority to Tribes." 54 Fed. Reg. 39,101 (1989) (emphasis added). Accordingly, "Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." (56 Fed. Reg. 64,880 (1991) (App. 105a).

Remarkably, EPA's brief never mentions the agency's longstanding conclusion that 33 U.S.C. § 1377(e) is not a delegation of federal power. Instead, EPA offers that Congress "set out the relevant standards for TAS status in Section 1377(e)," and, directly contradicting its explicit interpretation of section 518(e), now asserts that "this case does not arise out of a Tribe's bare assertion of inherent authority, but under the specific provisions of the CWA." EPA Brf. in Opp. at 15, 18.

EPA's muddled assertion cannot be reconciled with its position that the statute *requires* a tribe to demonstrate inherent authority as a condition of obtaining TAS status. EPA can evade its own requirement that tribes demonstrate inherent authority to regulate reservation waters only if it disowns the agency's formal, longstanding interpretation of the statute and amends its rule requiring an applicant tribe to show it possesses authority over the waters it seeks to regulate. *See* 40 C.F.R. § 131.8(b)(3)(ii) (2001) (requiring "[a] statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes [sic] assertion of authority.") Neither here nor in any of the proceedings below has EPA disavowed its position on delegation.

Nonetheless, EPA now adopts the legal non-sequitur embraced by the court of appeals, namely that because the United States can regulate navigable waters despite state ownership of them, tribes must be able to as well. EPA brf. at 15-16. However, tribes—like states—do not partake of federal power unless Congress shares it with them. The absence of any delegation of federal authority to tribes renders inapposite the existence or scope of federal power over navigable waters, which has never been an issue in this case.[2]

According to EPA's own rules and policies, if the Tribe has authority to regulate Wisconsin's waters, that authority must arise from the principles of inherent tribal sovereignty embraced by this Court. Yet EPA identifies no precedent supporting the proposition that a tribe can exercise regulatory authority over a state's sovereign resources, either inside or outside of a reservation. As EPA emphasizes, this Court's precedent primarily has dealt with the extent of tribal authority over the conduct of nonmembers on fee lands within reservations. EPA brf. at 16-18. Neither this Court nor any appellate court except the one below has ever addressed directly the first question presented in the petition–whether tribal inherent authority can displace state sovereignty over navigable waters under the equal footing doctrine.[3]

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[2] The primary theme of the Tribe's brief is that the regulatory power of the United States under the commerce clause supersedes state sovereignty under the equal footing doctrine. *See* Tribe's brf. at 11-13, 15-17. Without a delegation of federal power to tribes, this argument is irrelevant.

[3] EPA unprofitably relies upon *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. den.*, 522 U.S. 965 (1997), and *State of Mont. v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir.), *cert. den.*, 525 U.S. 921 (1998). EPA brf. at 11. *City of Albuquerque* did not involve a challenge to the grant of TAS status to the tribe, but only to the validity of the specific tribal water quality standards approved by EPA. Neither of the questions presented here was present in that case. 97 F.3d at 419-20. *State of Montana,* while addressing the second exception, did not address the question whether tribal water quality standards could be applied to navigable waters whose bed and banks are owned by the affected state.

EPA acknowledges that the *Montana* second exception applies to the exercise of tribal authority over nonmembers on fee lands within a reservation, a situation "wholly absent from this case."[4] EPA brf. at 13. But it leaves unanswered the critical question: if the *Montana* line of cases does not supply the doctrinal basis for tribal authority here, what precedent does?

EPA and the Tribe imply that because the waters are important to the Tribe, the Tribe must possess inherent authority to regulate them, notwithstanding that they belong to the state and that there are no nonmembers present on the reservation who pose a threat to the waters. But they cite no decision of this Court sanctioning this notion.

The Tribe also suggests that because there are no nonmembers on the reservation, TAS status only allows it to regulate "the activities of tribal members on tribal lands affecting reservation water quality which it had the right to do." Tribe's brf. at 23. But this case is not about the Tribe's undisputed ability to regulate its own members, or tribal lands. A tribe does not need TAS approval to impose environmental restrictions on its own members or to regulate its own lands. *See Montana*, 450 U.S. at 557, 563-564; *South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993). Instead, this case

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The equal footing doctrine was not implicated there since the tribe—not the state—owned the lakebed at issue. *See Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982). To the extent the *State of Montana* decision holds that EPA's 1991 regulations represent a correct interpretation of the second exception, it reinforces the need for this Court to underscore to EPA that the regulations' effective presumption in favor of inherent authority cannot be squared with the rule of *Montana* and subsequent cases.

[4] In fact, the absence of nonmembers and fee land within the reservation precludes a finding of tribal authority under the *Montana* second exception, since there is no threat of harm to the Tribe from nonmember conduct on the reservation.

is about tribal regulation of decidedly non-tribal lands—namely navigable waters owned by a state and over which a state acquired sovereignty at statehood under the equal footing doctrine. Indeed, the absence of fee lands makes this case an ideal one for squarely addressing the conflict between tribal inherent authority and state sovereignty under the equal footing doctrine.

EPA and the Tribe also assert, erroneously, that nonmembers will not be affected by the Tribe's TAS authority. To the contrary, EPA requires upstream dischargers to comply with downstream water quality standards; thus nonmember dischargers upstream of reservations would have to comply with tribal water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). More fundamentally, EPA and the Tribe ignore the direct and palpable infringement on Wisconsin's sovereignty arising from a tribe's ability to regulate the state's resource. Although the state's sovereignty over its navigable waters is undeniably subject to the exercise of commerce clause power by the United States, it cannot be overridden by the inherent authority of an Indian tribe. The clash of competing claims of sovereignty is presented here pure and unadulterated. Whether tribes possess inherent authority over navigable waters that passed to a state under the equal footing doctrine is, Wisconsin submits, a legal question not dependent on the particulars of the water body and its uses.

The failure of EPA and the Tribe to identify any support for the new species of tribal power impliedly recognized by the decision below reinforces the significance of the overarching legal question in this case, namely what relevant principles of Indian law recognize tribal power to regulate navigable waters belonging to a state and subject to state sovereignty?

II. THE ISSUES PRESENTED HERE ARE NOT FACT-BOUND.

An oft-repeated mantra in EPA's brief is that the agency's decision was "fact-specific," thereby presumably limiting the importance of a decision in this case. *See, e.g.*, EPA brf. at 10, 12-13. EPA's suggestion that it undertakes a "Tribe-by-Tribe" approach based on the unique facts of each tribe is disingenuous. EPA brf. at 20. As Wisconsin has already observed, EPA has created a virtually no-fail test for TAS status, under which a tribe need only assert that the waters on its reservation are important to it.[5] Pet. at 7-8.

Further, although the second issue presented by the petition—whether EPA's decision comports with the *Montana* test for inherent authority—necessarily involves facts, none of the relevant facts are in dispute. Whether a threat of water pollution from off-reservation discharges so endangers tribal self-governance as to preempt Wisconsin's ability to establish and enforce water quality standards on Rice Lake and thereby satisfy the requirements of the second exception is a question of both broad application and unique sovereign importance. The question is particularly compelling given the simple, and uncontroverted, fact that the respondent Tribe has fully adequate state or federal forums to protect any interest claimed in the waters at issue, and thus has no need to assert independent regulatory authority over the resource.

In sum, both questions presented in the petition present legal questions of great nationwide significance for states and tribes, as well as the citizens and communities within and near Indian reservations.

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[5] According to EPA 23 out of 49 tribal applications for TAS authority over the last decade have been approved. EPA brf. at 14 n.5. This information, even if accurate, is unhelpful in itself inasmuch as it does not reflect whether any applications have been denied. Given the delay traditionally accompanying EPA approvals, it may be that the remaining applications are still pending, or were withdrawn. In any event, that 50 tribes applied for TAS status in the first decade of the program is a good indicator of the substantial importance of this issue nationwide.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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May 13, 2002

MOTION FILED

MAY - 3 2002

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No. 01-1247

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF FIDELITY EXPLORATION & PRODUCTION COMPANY

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Counsel for Fidelity Exploration & Production Company ("Fidelity") respectfully files this motion for leave to file an *amicus curiae* brief on behalf of Fidelity. Fidelity's interest in this matter is vital, as the resolution of the issue presented by the Petition appears likely to determine whether Fidelity can develop its property interests in coalbed natural gas in the Powder River Basin of Wyoming and Montana, which figures prominently in the national energy policy and, therefore, the security plans, of the United States.

Mr. Glenn C. Reynolds, Attorney for the Tribe, did not respond to Fidelity's April 3, 2002, letter requesting consent for the filing of an *amicus* brief. In a telephone conversation the next week, he gave the assurance that he would respond in "ample time" for Fidelity to draft this motion if that became necessary. Mr. Reynolds did not do so. The United States and the State of Wisconsin promptly gave their consent on April 4.

Fidelity submitted an *amicus curiae* brief in support of the Petition in this matter on May 3, 2002, but did not realize the absence of the letter of consent or any response from the Tribe. When the omission of the consent was realized, a telephone call was placed to Mr. Reynolds. He stated that he had neglected to communicate to the undersigned the Tribe's position on the letter requesting consent and that the Tribe would not now grant its consent to the filing of Fidelity's *amicus curiae* brief.

Respectfully submitted,

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